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AMENDING PARTS II AND IV OF INTERSTATE COMMERCE ACT RE REPARATIONS

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HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

H.R. 5596

A BILL TO AMEND SECTIONS 204a AND 406a OF THE INTERSTATE COMMERCE ACT IN ORDER TO PROVIDE CIVIL LIABILITY FOR VIOLATIONS OF SUCH ACT BY COMMON CARRIERS BY MOTOR VEHICLE AND FREIGHT FORWARDERS

JUNE 14 AND 15, 1961

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CONTENTS

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AMENDING PARTS II AND IV OF INTERSTATE COMMERCE ACT, RE REPARATIONS

WEDNESDAY, JUNE 14, 1961

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 1301, New House Office Building, Hon. Harley O. Staggers presiding.

Present: Representatives Staggers (chairman), Friedel, Jarman, Collier, and Devine.

Mr. STAGGERS. The subcommittee will come to order.

The Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce is meeting this morning to hold hearings on H.R. 5596, a bill to amend sections 204a and 406a of the Interstate Commerce Act, providing civil liability for damages for violations of this act by common carriers, by motor vehicles, and freight forwarders.

This bill was introduced by the distinguished chairman of the committee, the Honorable Oren Harris, at the request of the Interstate Commerce Commission, and it would give effect to the Commission's legislative recommendation No. 11 in its 74th annual report to the Congress.

At present civil liability for violations exist with respect to violations by railroads and other carriers subject to part I of the Interstate Commerce Act and by water carriers subject to part III of this act.

Thus the bill would extend to shippers by motor carriers and freight forwarders the same rights as shipper by carriers, subject to parts I and III, of the act, now enjoy.

A copy of H.R. 5596, together with reports from the executive departments and agencies, will be made a part of the record at this point.

(The bill, H.R. 5596 and reports above referred to follow:)

[H.R. 5596, 87th Cong., 1st sess.]

A BILL To amend sections 204a and 406a of the Interstate Commerce Act in order to provide civil liability for violations of such Act by common carriers by motor vehicle and freight forwarders

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 204a of the Interstate Commerce Act is amended to read as follows:

"REPARATION AWARDS; LIMITATION OF ACTIONS

"SEC. 204a. (a) In case any common carrier by motor vehicle subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit

to do any act, matter, or thing in this part required to be done, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel's or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"(b) Any person, organization, or body politic claiming to be damaged by any such carrier may either make complaint to the Commission or may bring suit in his or their own behalf for the recovery of the damages for which such carrier may be liable under the provisions of subsection (a), in any district court of the United States of competent jurisdiction; but such person, organization, or body politic shall not have the right to pursue both of said remedies.

"(c) When a complaint as authorized in paragraph (b) of this section is filed with the Commission, a statement of such complaint shall be forwarded by the Commission to the carrier or carriers named in such complaint, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such carrier or carriers within the time specified shall make reparation for the injury alleged to have been done, such carrier or carriers shall be relieved of liability to the complainant only for the particular violation of law set forth in the complaint. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating the said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means at it shall deem proper.

"(d) If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof by any carrier, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

"(e) If such carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file with the district court of the United States for the district in which he or it resides, or in which is located the principal operating office of such carrier, or in which such carrier operates, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"(f)(1)(A) All actions at law by common carriers by motor vehicle subject to the provisions of this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

"(B) All complaints against such carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subparagraph (D).

"(C) For the recovery of overcharges, action at law shall be begun or complaint filed with the Commission against such carriers within three years from the time the cause of action accrues, and not after, subject to subparagraph (D), except that if claim for the overcharge has been presented in writing to the carrier within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the carrier to the claimant of disallowances of the claim, or any part or parts thereof, specified in the notice.

"(D) If on or before expiration of the two-year period of limitation in subparagraph (B) or the three-year period of limitation in subparagraph (C) a common carrier by motor vehicle subject to the provisions of this part begins action under subparagraph (A) for recovery of charges in respect of the same transportation service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or charges are collected by the carrier.

"(2) The cause of action in respect of a shipment of property shall, for the

purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after.

"(3) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

"(4) The term 'overcharges' as used in this section means charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

"(5) The provisions of this section 204a shall extend to and embrace all transportation of property or passengers for or on behalf of the United States in connection with any action brought before the Commission or any court by or against carriers subject to this part: *Provided, however,* That with respect to such transportation of property or passengers for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U.S.C. 66), whichever is later.

"(g) In suits brought to enforce an order of the Commission for the payment of money all parties in whose favor the Commission may have made an award of damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant has his or its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff."

SEC. 2. Section 406a of the Interstate Commerce Act is amended to read as follows:

"REPARATION AWARDS; LIMITATION OF ACTIONS

"SEC. 406a. (a) In case any freight forwarder subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such freight forwarder shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel's or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"(b) Any person, organization, or body politic claiming to be damaged by any such freight forwarder may either make complaint to the Commission or may bring suit in his or their own behalf for the recovery of the damages for which such freight forwarder may be liable under the provisions of paragraph (a) of this section, in any district court of the United States of competent jurisdiction; but such person, organization, or body politic shall not have the right to pursue both of said remedies.

"(c) When a complaint as authorized in paragraph (b) of this section is filed with the Commission, a statement of such complaint shall be forwarded by the Commission to the freight forwarder or forwarders named in such complaint, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such freight forwarder or forwarders within the time specified shall make reparation for the injury alleged to have been done, such freight forwarder or forwarders shall be relieved of liability to the complainant only for the particular violation of law set forth in the complaint. If such freight forwarder or forwarders shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating the said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"(d) If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof by any freight forwarder, the Commission shall make an order directing the freight forwarder to pay to the complainant the sum to which he is entitled on or before a day named.

"(e) If such freight forwarder does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file with the district court of the United States for the district in which he or it resides, or in which is located the principal operating office of such freight forwarder, or in which such freight forwarder operates, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

"(f)(1)(A) All actions at law by freight forwarders subject to the provisions of this part for the recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.

"(B) All complaints against such freight forwarders for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subparagraph (D).

"(C) For the recovery of overcharges action at law shall be begun or complaint filed with the Commission against such freight forwarders within three years from the time the cause of action accrues, and not after, subject to subparagraph (D), except that if claim for the overcharge has been presented in writing to the freight forwarder within the three-year period of limitation said period shall be extended to include six months from the time notice in writing is given by the freight forwarder to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

"(D) If on or before expiration of the two-year period of limitation in subparagraph (B) or the three-year period of limitation in subparagraph (C) a freight forwarder subject to the provisions of this part begins action under subparagraph (A) for recovery of charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the freight forwarder.

"(2) The cause of action in respect of a shipment of property shall, for the purposes of this section, be deemed to accrue upon delivery or tender of delivery thereof by the freight forwarder, and not after.

"(3) A complaint for the enforcement of an order of the Commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

"(4) The term 'overcharges' as used in this section means charges for services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

"(5) The provisions of this section 406a shall extend to and embrace all transportation of property for or on behalf of the United States in connection with any action brought before the Commission or any court by or against freight forwarders subject to this part: *Provided, however*, That with respect to such transportation of property for or on behalf of the United States, the periods of limitation herein provided shall be extended to include three years from the date of (A) payment of charges for the transportation involved, or (B) subsequent refund for overpayment of such charges, or (C) deduction made under section 322 of the Transportation Act of 1940 (49 U.S.C. 66), whichever is later.

"(g) In suits brought to enforce an order of the Commission for payment of money all parties in whose favor the Commission may have made an award of damages by a single order may be joined as plaintiffs, and all of the freight forwarders parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant has his or its principal operating office. In case of such joint suit the

recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff."

SEC. 3. Section 401 of the Interstate Commerce Act is amended by striking out "Sec. 406a. Actions for recovery of charges; limitation of actions," and inserting in lieu thereof the following:

"SEC. 406a. Reparation awards; limitation of actions."

SEC. 4. The amendments made by this Act shall be applicable only with respect to cases in which the cause of action accrues after the effective date of the Act.

INTERSTATE COMMERCE COMMISSION,
Washington, D.C., March 28, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

DEAR CHAIRMAN HARRIS: Yesterday I received your letter dated March 20, 1961, enclosing copies of a bill, H.R. 5596, introduced by you, to amend sections 204a and 406a of the Interstate Commerce Act in order to provide civil liability for violations of such act by common carriers by motor vehicle and freight forwarders, and requesting a report and comments thereon.

This proposed measure would give effect to legislative recommendation No. 11 in the Commission's 74th annual report. Copies of the draft bill, together with a statement of justification therefor, were transmitted to you with my letter of February 24, 1961, requesting introduction. Additional copies of that transmittal are enclosed for convenience of reference.

Your assistance in introducing this proposed measure is very much appreciated.

Sincerely,

EVERETT HUTCHINSON, *Chairman.*

RECOMMENDATION NO. 11

This proposed bill would give effect to legislative recommendation No. 11 of the Interstate Commerce Commission as set forth on page 190 of its 74th annual report as follows:

"We recommend that sections 204a and 406a be amended to make common carriers by motor vehicle and freight forwarders, respectively, liable for the payment of damages in reparation awards to persons injured by them through violations of the act."

JUSTIFICATION

The attached draft bill would amend sections 204a and 406a of the Interstate Commerce Act, which relate to actions at law for the recovery of charges by or against common carriers by motor vehicle and freight forwarders, so as to make such carriers liable for the payment of damages to persons, including the United States as a shipper, injured by them as a result of violations of parts II and IV of the act, respectively. It would also give to an injured party the choice of pursuing his remedy either before the Commission or in any district court of the United States of competent jurisdiction. Appropriate periods of limitation are provided with respect to the commencement of such actions or proceedings.

At present, such liability exists, and such remedy is provided, only with respect to violations by railroads and other carriers subject to part I and by water carriers subject to part III of the act. Prior to the decision of the Supreme Court in *T. I. M. E. Inc.* v. *United States* (359 U.S. 464, May 18, 1959), the Commission, upon petition, made determinations of the reasonableness of past motor carrier rates on the assumption that the petitioner was entitled to maintain an action in court for reparations based upon the unreasonableness of such rates. However, in that case, the Court ruled that a shipper by a motor common carrier subject to part II cannot challenge in postshipment litigation the reasonableness of the carrier's past charges made in accordance with applicable tariffs filed with the Commission. A shipper, therefore, is without remedy for injury arising from the application of an unreasonable rate. Since the pertinent provisions of part IV are similar to those under part II, a shipper by freight forwarder subject to part IV is in the same plight.

The motor carrier industry has attained stature and stability as one of the chief agencies of public transportation, handling a substantial volume of the

Nation's traffic. It seems appropriate, therefore, that shippers should have the same rights of recovery against motor carriers as they have against rail and water carriers for violations of the act.

The need for the relief proposed is evidenced by the number of proceedings instituted by shippers for dedress against motor common carriers prior to the decision in the *T.I.M.E.* case. During the years ended June 30, 1958 and 1959, for example, 20 and 14 formal complaints or petitions, respectively, were filed to secure the Commission's determination of the reasonableness of established motor carrier rates ancillary to court actions for the recovery of reparations. During the calendar year 1958, a total of 101 informal complaints were filed against motor carriers claiming damages for unreasonable rates and practices. In 1950 only 10 such complaints were handled by the Commission, but by 1954 the number had risen to 110. Prior to the decision in the *T.I.M.E.* case, adjustments of such complaints were negotiated, in appropriate cases, by an informal and inexpensive procedure involving informal conferences and correspondence with the parties. Many informal complaints, however, were found not to be susceptible of adjustment by such means. If the Commission had then been vested with the requisite authority, the filing of formal complaints seeking awards of reparations probably would have followed, as is now the practice under parts I and III of the act. In this connection it should be noted that reparation procedures before the Commission are more simple and less expensive than actions in court to attain the same end. It may be anticipated, therefore, that although both the courts and the Commission would be authorized under the proposed amendments to award reparations, shippers would prefer resort to the Commission since, in any event, the reasonableness of the rates involved would, under the provisions of the act, have to be determined by it upon referral of the question by the court.

While experience under part IV has not shown an important need for a provision authorizing awards of reparations against freight forwarders, it seems desirable and logical to have all four parts of the act uniform in this respect. Appropriate amendments to section 406a have therefore been included in the draft bill.

For the reasons set forth above, the Commission recommends early consideration and enactment by the Congress of this proposed measure.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington, D.C., June 13, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D.C.

MY DEAR MR. CHAIRMAN: This is in reply to your letters of February 9, 1961, and March 20, 1961, requesting the views of this office with respect to H.R. 2765 and H.R. 5596, similar bills to provide civil liability for violations of the Interstate Commerce Act by common carriers by motor vehicle and freight forwarders.

In the reports which they are making to your committee, the various agencies recommend enactment of the bills in order to give shippers using motor carriers and freight forwarders the same rights with respect to recovery of unreasonable and unlawful charges as shippers now have with respect to rail and water carriers.

The Bureau of the Budget concurs with the views contained in these reports and recommends that legislation for these purposes be enacted.

Sincerely yours,

PHILLIP S. HUGHES,
Assistant Director for Legislative Reference.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, May 31, 1961.

Hon. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. CHAIRMAN: We refer again to your letter of May 11, 1961, in which you asked for our comments on H.R. 5596. The bill proposes to amend the Interstate Commerce Act in order to subject motor common carriers and freight forwarders to civil liability for violations of the act. Having the same purpose

is H.R. 2765, on which we commented in our letter of April 4, 1961, B–120670. Two similar bills, S. 676 and S. 1283, are pending before the Senate Committee on Commerce.

When motor common carriers and freight forwarders operating in interstate commerce were subjected to regulation under the Interstate Commerce Act, they were not subjected also to specific statutory civil liability for damages because of unlawful rates, charges, regulations, or practices, as are rail common carriers subject to part I and water common carriers subject to part III of the act. The Interstate Commerce Commission, however, concluding that a common law remedy for the exaction of unlawful charges had survived the passage of the Motor Carrier Act, reasoned that it possessed the authority to determine the reasonableness of past motor carrier rates in a proceeding ancillary to a judicial action to enforce that common law remedy. This doctrine explained in *Bell Potato Chip Company* v. *Aberdeen Truck Line* (43 M.C.C. 337 (1944)), prevailed in the Federal courts and in the Commission until May 18, 1959, when the Supreme Court, in *T.I.M.E., Inc.* v. *United States* (359 U.S. 464), decided that shippers, including the United States, aggrieved by the exaction of unlawful charges for motor common carrier transportation, are without redress because part II of the Interstate Commerce Act does not contain reparation provisions similar to those in part I.

In the audit of transportation charges paid by the Government in accordance with section 322 of the Transportation Act of 1940, as amended, 49 U.S.C.A. 66, we have frequently encountered situations where the charges paid, based upon duly published and filed tariffs, were and are prima facie or conclusively unlawful in the light of established principles and standards used by the Commission and the courts when considering similar charges on other shipments transported under substantially similar circumstances and conditions. Before the T.I.M.E., decision we availed the Government of the Commission's prior findings of unreasonableness in particular cases, since all parties affected by the unreasonable charges were entitled to take advantage of the Commission's ruling. *Mitchell Coal Company* v. *Pennsylvania Railroad Company* (230 U.S. 247, 257 (1913)); *A. J. Phillips Company* v. *Grand Trunk Western Railway Company* (236 U.S. 662 (1915). Since the T.I.M.E. decision, however, this rule of entitlement no longer obtains as to unreasonable interstate motor common carrier charges. In this situation, no forum is empowered to grant relief to shippers damaged by unreasonable motor common carrier or freight forwarder charges.

Not only the Government, the largest single user of motor and other common carrier services, but also similarly circumstanced private shippers are adversely affected. Statistical records maintained by our Transportation Division illustrate to some extent the effect on the Government's transportation costs. Between May 18, 1959, when the T.I.M.E. decision was announced, and April 29, 1961, its audit of motor common carrier paid bills indicated that the Government has paid transportation charges believed to exceed the lawful and reasonable charges by more than $1,275,000. This total represents comparisons of the paid charges with reasonable charges based upon Interstate Commerce Commission precedents established in proceedings involving comparable situations. The total figure is not all-inclusive since not all agencies are required to submit their paid vouchers to us for a detailed audit and since our figures do not reflect excess charges which do not fall clearly within the pattern of decided cases on unreasonableness. For the period from May 18, 1959, through April 29, 1961, the overpayments (unreasonable charges) revealed in our audit have averaged approximately $13,000 per week; the current rate for the 3-month period ended April 29 is just under $5,000 per week. It should be appreciated, however, that our earlier findings were derived from a backlog of accounts on which final analysis was postponed pending the disposition of the *T.I.M.E.* case. Also for consideration is the fact that variations in the excess amounts found may be occasioned by such events as a temporary change in the available work force, temporary emphasis on other phases of our audit responsibilities, or tariff changes which result in the correction of unlawful situations.

We believe that neither the United States nor private shippers should be required to pay motor common carrier and freight forwarder transportation charges without the corresponding right, in proper circumstances, to challenge the lawfulness of such payments on past shipments. We also think that all carriers regulated under the Interstate Commerce Act should be uniformly

treated with respect to civil liability for violations of the act. We therefore strongly recommend that your committtee take favorable action on H.R. 5596.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

Mr. STAGGERS. The first witness before the subcommittee will be the Honorable Everett Hutchinson, Chairman of the Interstate Commerce Commission.

Mr. Hutchinson.

STATEMENT OF HON. EVERETT HUTCHINSON, CHAIRMAN, INTERSTATE COMMERCE COMMISSION

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name is Everett Hutchinson. I am the present Chairman of the Interstate Commerce Commission and have served in that capacity since January 1 of this year. I am appearing today to testify on the Commission's behalf on a bill, H.R. 5596, which was introduced by Chairman Harris at our request and which would give effect to legislative recommendation No. 11 in our 74th annual report to Congress.

H.R. 5596 would amend sections 204a and 406a of the Interstate Commerce Act, which relate to actions at law for the recovery of charges by or against common carriers by motor vehicle and freight forwarders. Under the provisions of this measure, common carriers by motor vehicle and freight forwarders would be liable for the payment of damages to persons, including the United States as a shipper, when injured by them as a result of violations of parts II and IV of the act, respectively. An injured party would also be given a choice as to whether he wishes to pursue his remedy before the Commission or in any U.S. district court of competent jurisdiction. The bill also provides for appropriate periods of limitation, corresponding to those in parts I and III of the act with respect to the commencement of such actions or proceedings.

At the present time, the same liability exists, and the same remedy is provided, with respect to violations by railroads and other carriers subject to part I and by water carriers subject to part III of the act. Prior to the Supreme Court's decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, decided May 18, 1959, the Commission, upon petition, made determinations of the reasonableness of past motor carrier rates on the assumption that the petitioner was entitled to maintain an action in court for reparations based upon the unreasonableness of such rates.

In that case, however, the Court ruled that a shipper by motor common carrier subject to part II has no right to maintain such an action. In other words, such a shipper cannot challenge, in postshipment litigation, the reasonableness of the carrier's past charges made in accordance with applicable tariffs filed with the Commission.

Thus, a shipper is without remedy for injury arising from the application of an unreasonable rate. Inasmuch as the pertinent provisions of part IV are similar to those under part II, a shipper by freight forwarder, subject to part IV, is in the same predicament.

The motor carrier industry of today has attained a level of statute and stability which ranks it as one of the chief agencies of public

transportation, handling a substantial volume of our Nation's traffic. It seems altogether appropriate, therefore, that shippers should have the same right of recovery against motor carriers, and indeed, against freight forwarders, as they have against rail and water carriers for violations of the act.

The necessity for enactment of H.R. 5596 is clearly indicated by the number of proceedings instituted by shippers for redress against motor common carriers prior to the decision in the *T.I.M.E.* case. During the year ended June 30, 1958, 20 formal complaints or petitions were filed to secure the Commission's determination of the reasonableness of established motor carrier rates ancillary to court actions for the recovery of reparations.

As of June 30, 1959, 14 such formal complaints or petitions were filed. During the calendar year 1958, a total of 101 informal complaints were filed against motor carriers claiming damages for unreasonable rates and practices. In 1950, only 10 such complaints were handled by the Commission. In 1954, however, the number had risen to 110.

Up until the decision in the *T.I.M.E.* case, adjustments of such complaints were negotiated, in appropriate cases, by an informal and inexpensive procedure involving informal conferences and correspondence with the parties. However, we found many informal complaints not to be susceptible of adjustment by this means. If the Commission, at that time, had been vested with the authority contemplated by H.R. 5596, the procedure of filing formal complaints seeking awards of reparations probably would have followed, as is now the practice under parts I and III of the act, rather than going into court.

In this connection, it should be emphasized that reparation procedures before the Commission are more simple and less expensive than actions in court to attain the same end. We feel it may be reasonably anticipated, therefore, that even though both the courts and the Commission would be authorized under this bill to award reparations, shippers would prefer to come directly to the Commission since, in any event, the reasonableness of the rates involved would, under the provisions of the act, have to be determined by us upon referral of the question by the court.

The view has been expressed that since rates proposed by carriers are, at the time of filing and prior to their effective date, subject to an order of suspension and investigation by the Commission either upon its own motion or upon protest by any interested party, any rate which has not been subjected to investigation at that time must thereafter be deemed reasonable.

In this connection, however, it should be borne in mind that even the preliminary task of determining whether suspension and investigation of proposed changes in rates is warranted would require the examination of many thousands of proposed rates. A task such as this is simply beyond the present capacity of the Commissioner's facilities.

For example, during the year ended June 30, 1960, an undertaking of this nature would have required the careful scrutiny of approximately 171,679 common carrier freight tariffs. Of these, 105,344 were offered by motor common carriers and 11,539 by freight forwarders. Many of these contained numerous changes in rates.

We understand the view has also been expressed that since a shipper may, by the filing of a protest, invoke the Commission's investigatory power to determine the reasonableness of a proposed rate, he is thereafter precluded from questioning the reasonableness of the rate for the purpose of reparation if he has failed to file such protest.

A requirement of this type would, in our opinion, be entirely unrealistic. This would mean that a shipper would have to exercise constant vigilance over the filing of rates in order that those of interest to him would not escape his notice and become effective without his protest. In view of the thousands of rates filed each year, this would impose a heavy burden upon shippers which many, especially the smaller ones, are not in a position to bear.

Although our experience under part IV of the act has not shown an immediate and urgent need for a provision authorizing awards of reparations against freight forwarders, it does seem both desirable and logical to have all four parts of the act uniform in this respect. We feel, therefore, that this is an opportune time to amend section 406a as provided in the bill.

Mr. Chairman and members of the subcommittee, we urge your favorable consideration of H.R. 5596 and we appreciate the opportunity to appear and explain our reasons for recommending that parts II and IV of the Interstate Commerce Act be amended as proposed in the bill. If there are any questions at this time, I will be glad to attempt to answer them.

Mr. STAGGERS. Mr. Hutchinson, we appreciate your coming and giving us your view.

I would like to get this clear: That the bill was introduced at the request of the Commission?

Mr. HUTCHINSON. That is correct, Mr. Staggers.

Mr. STAGGERS. And you are completely and wholeheartedly in favor of it?

Mr. HUTCHINSON. Yes, sir.

Mr. STAGGERS. Do you have any questions, Mr. Friedel?

Mr. FRIEDEL. Mr. Hutchinson, what are the main objections to the bill or who is opposed to the bill?

Mr. HUTCHINSON. Well, I am not entirely sure, Mr. Friedel. I am sure the committee will find that out.

I believe certain industry representatives, although I do not speak for them, are here in opposition to the bill; at least the segments of the industry involved.

Mr. FRIEDEL. That is all I wanted to ask.

Mr. HUTCHINSON. Thank you.

Mr. FRIEDEL. You cannot tell us what the opposition might be?

Mr. HUTCHINSON. I am sorry I cannot be more helpful on that.

Mr. STAGGERS. Mr. Collier?

Mr. COLLIER. No questions.

Mr. STAGGERS. Mr. Jarman?

Mr. JARMAN. I have no questions.

Mr. STAGGERS. Thank you very kindly then, Mr. Chairman.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. STAGGERS. If we need you I guess we can get you back?

Mr. HUTCHINSON. Indeed, sir.

Mr. STAGGERS. All right. Thank you.

The next witness that we have is Mr. Frederick W. Denniston, Assistant Commissioner, Office of Public Utilities and Representation, Transportation and Public Services, General Services Administration.

Mr. Denniston.

STATEMENT OF FREDERICK W. DENNISTON, ASSISTANT COMMISSIONER, OFFICE OF PUBLIC UTILITIES AND REPRESENTATION, TRANSPORTATION AND PUBLIC SERVICES, GENERAL SERVICES ADMINISTRATION

Mr. DENNISTON. Mr. Chairman and members of the subcommittee——

Mr. STAGGERS. Do you have a prepared statement?

Mr. DENNISTON. No, sir.

Mr. STAGGERS. You do not?

Mr. DENNISTON. I might just state that in view of the excellent coverage of the subject which has been given by Commissioner Hutchinson, my remarks will really be supplementary to his statement.

GSA, General Services Administration, represents the executive agencies of the Government in their capacity as shippers, and it is in this capacity that I speak to you. In other words, we are speaking to you on behalf of the Government's interest in this subject matter solely as a shipper and not in any regulatory capacity, of course.

We urge that you enact this bill. We support the bill entirely. And GSA itself has a legislative proposal, which has been submitted to the Speaker of the House, on January 10, 1961.

Except for one or two very minor changes in language, the present bill, H.R. 5596, is identical with the proposal which we have offered and we support the bill in its present form.

The differences are very slight and of no consequence.

The reasons we are interested, of course, is that the Government, as a shipper, ships large quantities of freight and we are confronted with the situation which Commissioner Hutchinson has already outlined, in that there are instances where we use the carriers who are subject to parts II and IV of the Interstate Commerce Act; where as a shipper we are left without a remedy in the event there are instances where rates are unreasonable, prejudicial, preferential, or discriminatory.

The act, of course, in both parts II and IV, declare that such rates are unlawful, but the effect of the Supreme Court decision in the *T.I.M.E.* case has had the effect of saying that while they are unlawful, the shippers have no remedy for the situation, certainly so far as the past is concerned.

As has been mentioned, I believe, indirectly by the Commissioner, there has been a procedure under which shippers have been able to obtain redress in these situations under the Motor Carrier Act and this doctrine has prevailed for approximately 20 years when the Court's decision, to which reference has been made, had the effect of overruling that doctrine.

And so we found ourselves, as of the date of that decision, lacking a remedy in this situation.

In our consideration of this matter we have worked closely with the other executive agencies and with the General Accounting Office, and

we are all of the view that this legislation should be enacted, and we urge that it be given favorable action by this committee.

That concludes my statement, sir.

Mr. STAGGERS. Mr. Denniston, you mentioned the *T.I.M.E.* case there, and Mr. Hutchinson brought it up.

Under that case—that was decided in 1960, I believe?

Mr. DENNISTON. Yes, sir.

Mr. STAGGERS. Under that case the shipper had no right to take anyone to court?

Mr. DENNISTON. That is correct.

Mr. STAGGERS. They had no redress?

Mr. DENNISTON. That is correct.

Mr. STAGGERS. You say you are a large shipper as the GSA and, I presume, one of the largest.

How about the military? They do not come under you, do they?

Mr. DENNISTON. No, in the transportation field they do not.

I assume they will express their own views on this bill.

Mr. STAGGERS. I see. But I expect with the exception then or with that exception you are probably one of the largest shippers of the Government?

Mr. DENNISTON. Yes, sir.

Mr. STAGGERS. That is all the questions I have.

Do you have any questions, Mr. Friedel?

Mr. FRIEDEL. No, sir.

Mr. STAGGERS. Mr. Collier?

Mr. COLLIER. No questions.

Mr. STAGGERS. Mr. Jarman?

Mr. JARMAN. Mr. Denniston, what has been the procedure of GSA in cases that would normally fall within the jurisdiction of this provision?

What have you done in cases of rate disputes?

Mr. DENNISTON. Well, this becomes a complicated question, sir, in that prior to the enactment of Public Law 85–625 of the 85th Congress, the procedure has been that where instances of, for example, unreasonableness of a motor carrier rate had been disclosed—and I might say that this was the type of situation that was involved in the *T.I.M.E.* case, the procedure had been that the General Accounting Office had the authority at that time to make an administrative collection in the settlement of the accounts with the carriers.

And, applying the doctrine of this *Bell Potato Chip* case of the Interstate Commerce Commission which supplied the basis for the administrative finding that a particular rate was unreasonable, thereafter the General Accounting Office would collect this amount under their right to make an administrative offset.

I believe, however, that it would be best if the General Accounting Office explained that in greater detail.

In any event, when Public Law 85–625 was passed in 1958 certain technical changes were made in the act which precluded this action, and this was just shortly before the *T.I.M.E.* decision.

So the two matters, the amendment to the act and the *T.I.M.E.* decision, had a combined effect so far as the Government agencies were concerned.

So that the answer to your question, sir, is that prior to the *T.I.M.E.* decision, a formal complaint was not required and there had none been filed in this particular area.

In the intervening time, awaiting legislation, of course, the *T.I.M.E.* decision held that no complaint could be filed. So at the moment we are in a vacuum, so to speak, in that we are working with the General Accounting Office and they are currently keeping us advised as they find situations of this sort, and we hope that the legislation will be enacted which will thereupon permit proper complaints to be filed so that the Interstate Commerce Commission may make an appropriate determination.

Mr. COLLIER. Will the gentleman yield at that point?

Mr. JARMAN. Yes.

Mr. COLLIER. Would this be retroactive to such violations as occurred during this so-called vacuum period or not?

Mr. DENNISTON. That is not my understanding.

The bill, as I recall it, the last section of the bill—I believe it is either section 3 or 4—specifically states:

> The amendments made by this Act shall be applicable only with respect to cases in which the cause of action accrues after the effective date of the Act.

Mr. STAGGERS. Any more questions?

Mr. JARMAN. No.

Mr. STAGGERS. Mr. Devine, do you have any questions?

Mr. DEVINE. No.

Mr. STAGGERS. You mentioned the GAO, the General Accounting Office, there and consulting them. I just wondered if you have any idea of how much money has been involved in these overcharges since you have been in consultation with the General Accounting Office?

Mr. DENNISTON. Well, it is our understanding that there are substantial amounts involved, but I believe representatives of the GAO are here and I prefer that they speak themselves.

Mr. STAGGERS. All right. I just thought maybe you might know and we will bring that question up to them.

If there are no further questions then—oh, did you have a question, Mr. Devine?

Mr. DEVINE. No.

Mr. STAGGERS. We thank you very kindly, Mr. Denniston, for coming and giving us the benefit of your views.

The next witness will be a representative of the General Accounting Office. I do not know who that will be.

STATEMENT OF E. W. CIMOKOWSKI, ASSISTANT GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE, ACCOMPANIED BY GERALDINE RUBAR, ATTORNEY, OFFICE OF THE GENERAL COUNSEL; HILLIS K. WILSON, ASSISTANT DIRECTOR, TRANSPORTATION DIVISION; THOMAS C. McNEILL, TRANSPORTATION SPECIALIST, TRANSPORTATION DIVISION

Mr. STAGGERS. Will you state your name for the record?

Mr. CIMOKOWSKI. Thank you, Mr. Chairman.

If the chairman and the subcommittee will indulge us a moment, I would like the rest of these people in our office who have worked with me on this matter up here.

Mr. STAGGERS. That will be fine. Bring them right up and we would like for you to introduce them for the record and tell their official capacity too, if you will.

If you care to have them, you can have them right there.

Mr. CIMOKOWSKI. Right, sir.

Mr. Chairman, my name is Edwin W. Cimokowski. I am an Assistant General Counsel in the U.S. General Accounting Office.

With me are Miss Rubar, who is an attorney-adviser in our office or the Office of the General Counsel; Mr. Wilson who is Assistant Director in the Transportation Division, and Mr. McNeill who is a transportation specialist in our Transportation Division.

Mr. Chairman and members of the committee, we appreciate the opportunity given the General Accounting Office of appearing before your committee with respect to H.R. 5596. We are in favor of H.R. 5596 and are anxious to see such proposed legislation enacted. As a matter of fact, Mr. Joseph Campbell, the Comptroller General, in his annual report to the Congress for the fiscal year ending June 30, 1960, recommended early favorable consideration of similar proposals, as part of the legislative program of the General Accounting Office.

We worked closely with other interested Government agencies in formulating proposals for similar bills which were introduced in the 86th Congress but were not reached for consideration before adjournment. The present form of the law, lacking the amendments proposed in H.R. 5596, has cost the Government and other shippers of freight substantial sums of money which might have been recovered if motor carriers and freight forwarders were required to answer in damages for collecting unreasonable rates and charges.

Shortly after the *T.I.M.E.* and *Davidson* cases (359 U.S. 464) were decided in May 1959, the General Accounting Office began a special study as an incident of the regular audit program covering transportation payments made by the various Government departments and establishments to interstate motor common carriers.

This study is designed to provide a basis for estimating the amounts being paid from appropriated funds in the form of unreasonable transportation charges. We set up certain categories of unreasonable tariff situations predicated on principles established by the Interstate Commerce Commission in rulings prior to the Supreme Court decision in the *T.I.M.E.* and *Davidson* cases.

Using the principles of the Commission-decided cases to determine the maximum reasonable charge basis, we calculated the amounts expended in excess of the reasonable charge basis on individual motor carrier shipments made by Government agencies subject to our audit.

We found the largest totals of overpayments in four major categories of tariff situations. These four categories involved (1) exclusive use of vehicle rules; (2) instances where through rates exceeded the aggregate of intermediate rates; (3) instances where commodity rates and exceptions to the motor freight classification resulted in higher charges than derived from the application of classification ratings; and (4) capacity or minimum charge rules.

Due to a backlog of accounts which accumulated pending a ruling in the *T.I.M.E.* and *Davidson* cases, we were finding in the early stages of our special study excessive payments—that is, payments exceeding reasonable charges—to motor common carriers at a rate of $25,000 per

week; later the figure steadied for a time at a rate of $16,000 per week, and now, 2 years after the *T.I.M.E.* and *Davidson* cases, we continue to find excessive payments of this nature at a rate of about $6,000 a week.

The decrease in weekly averages may be explained by the fact that our earlier computations were derived from a backlog of accounts on which final analysis was postponed pending the disposition of the *T.I.M.E.* and *Davidson* cases. For the 2-year period the average works out to about $13,000 per week.

Some downward trend may be explained by amendments in motor carrier tariffs resulting in removal of tariff features objectionable on the ground of unreasonableness, or adjustments on later traffic by section 22 tenders. For example, there is an increased tendency by motor carriers to protect an aggregate of intermediate rates lower than a through rate by appropriate tariff revision when such a prima facie unreasonable rate situation is brought to their attention.

We should mention, too, that variations in the weekly areas may be caused by temporary changes or shifts in the available work force or temporary emphasis upon other phases of our audit responsibilities.

We think the present rate of excessive payments due to unreasonableness will be fairly constant. Thus, at the present weekly rate of about $6,000 per week, the shipping agencies of the United States will be spending more than $300,000 yearly of the taxpayers' money, without any hope of recovery, for unreasonable motor common carrier charges.

In the past 2 years we estimate that about $1¼ million have been so paid out on vouchers which have been audited by our Office. How much more in the way of unreasonable charges is being paid out by Government agencies not required to submit their paid vouchers to the General Accounting Office for a detailed audit on a monthly basis is not known.

Additionally, we do not know how much more in excess of reasonable rates and charges has been and is being paid out to interstate motor common carriers for transportation services which do not fall definitely within the pattern of decided cases. This would occur where the cost factors entering into the computation of a particular freight rate and the comparability of the rate with rates on traffic having similar transportation characteristics would have to be considered.

Such cases are not within the reach of our facilities and resources, although it is our intention in the regular course of our audit to maintain a close watch for rate situations which suggest the need for further development as to unreasonable aspects and, if warranted, to refer the matter to the responsible Government shipping agency for possible adjustment proceedings in the administrative tribunal having jurisdiction over the matter.

The Government is said to be the Nation's largest single user of common carrier services, but it does not suffer alone in its inability to recover reparation from motor carriers and freight forwarders. All other users of the services of those carriers are in precisely the same position in this respect; they, too, are without a remedy under the present state of the law to recover damages incurred because of unreasonable rates and charges which may be assessed by motor carriers and freight forwarders.

H.R. 5596, if enacted, would give shippers that remedy and would, in this respect, make equal all carriers and all users of the various common carrier services subject to the Interstate Commerce Act. Interstate rail carriers since 1906, and interstate water carriers since 1940, when they were first brought under Federal regulation, have been amenable to proceedings for reparation where unreasonable rates and charges have been collected.

We know of no good reason why motor carriers and freight forwarders should continue to enjoy a special preferential immunity from such proceedings.

Before the ruling of the U.S. Supreme Court in the *T.I.M.E.* and *Davidson* cases (May 18, 1959), it was widely believed that any shipper via interstate motor common carrier had a right, through a combination of court and Interstate Commerce Commission proceedings, to reparation for unreasonable rates and charges. The Commission itself reached this conclusion in a line of cases typified by *Bell Potato Chip Co.* v. *Aberdeen Truck Line* (43 M.C.C. 337 (1944)), where the problem was exhaustively considered.

On the basis of such cases the General Accounting Office postpayment audit was so geared as to insure the recovery of unreasonable payments, following rulings by the Interstate Commerce Commission in comparable cases, by voluntary refund, by setoff, or by resort to necessary judicial proceedings through the Department of Justice. Governmental setoff action, specifically authorized in section 322 of the Transportation Act of 1940 (49 U.S.C.A. 66) was ended, as to unreasonable charges, by Public Law 85–762—amending section 322, among other provisions of law—effective as to transactions taking place after August 26, 1958.

Public Law 85–762 limited recovery action to "overcharges"—superseding the term "overpayment" in section 322—defined as—

> charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Interstate Commerce Commission and the Civil Aeronautics Board and charges in excess of those applicable thereto under rates, fares, and charges established pursuant to section 22.

The term "overpayments" had been viewed as embracing overcharges as well as unreasonable charges, prior to the amendment by Public Law 85–762. Eventually, the *T.I.M.E.* case precluded recourse to any method or remedy for the adjustment of unreasonable rates and charges by interstate motor common carriers.

As we see it, the situation is simply this:

1. We see no reason why there should not be uniformity in the treatment of all carriers subject to the Interstate Commerce Act, insofar as liability for unreasonable rates and charges is concerned.

2. We see no reason why shippers by interstate motor common carriers and freight forwarders should continue to be under a disability to sue for and collect damages for unreasonable rates and charges. The right to maintain an action for damages in such a case has existed for more than a half century of railroad regulation in this country; the regulatory structure should be reinforced to protect the shippers in their dealings with all types of carriers regulated under the Interstate Commerce Act.

3. We see no reason why the procurement agencies of the United States, or any other shippers of freight, should continue to pay sub-

stantial amounts in freight charges without having reserved to them by law the right, in the proper circumstances, to challenge the lawfulness of such payments with appropriate adjustments as determined by the regulatory body. If the present bill becomes law the United States would have no greater right than all other shippers doing business with motor carriers and freight forwarders.

In an appendix to this statement we have prepared explanatory statements of the four major classes or categories of service situations which have occasioned payments of unreasonable rates and charges to motor common carriers for transportation services furnished the United States, payments of the type on which action to correct is foreclosed under the present state of the law.

I would like to emphasize that these tabulations or statistical statements are prepared on the basis of rulings made by the Interstate Commerce Commission in what we deemed to be comparable cases involving relatively or exactly analogous facts.

And we feel that this appendix is more or less self-explanatory, but if time permits we would like to discuss one or two of the examples described.

Mr. STAGGERS. You may go ahead.

Mr. CIMOKOWSKI. Thank you, sir.

I would like to take as an example—and these pages, unfortunately, are unnumbered and it might require turning over a few pages.

There is a category which is category 3. The caption at the top of the page that I would like to read from is "Commodity or exceptions rates higher than class rates."

It appears——

Mr. STAGGERS. Would you hold just a minute until we find that?

Mr. CIMOKOWSKI. Yes, sir. It is the 10th page from the back.

Mr. STAGGERS. All right, sir.

Mr. CIMOKOWSKI. Generally speaking, rates are divided into three broad categories: (1) Class rates, (2) exceptions rates, and (3) commodity rates. Class rates are published in class-rate tariffs and are applied in accordance with different ratings (first class or class 1 being 100 percent and other classes being related thereto) named in freight classifications. Carload class rates are designed for occasional or sporadic movements.

Exceptions to the classification may establish rules, regulations, or ratings different from those published in the classification and, although employing class rates, their use generally results in lower charges to the shipper. Commodity rates, which are as a rule the outgrowth of special conditions, are published to apply on a specific commodity or group of commodities and are almost invariably lower than class rates.

On shipments of the same articles between the same points, rates derived from classification exceptions ratings ordinarily take precedence over rates derived from classification ratings and, in turn, commodity rates supersede the other two.

The Commission has held that the classification generally imposes the highest rate which a particular commodity should bear under normal conditions and a commodity rate which is higher than a class rate is an abnormality which on its face requires special justification. This applies with equal force to exceptions ratings which exceed the

normal classification basis. Thus a presumption of unreasonableness attaches to such situations, in the absence of special or unusual circumstances. An example selected during the course of the General Accounting Office audit is contained in the attached statement.

The attached statement consists of a tabulation and, behind that, a worksheet which is for internal use in our office, described as form T–345.

In this statement we have selected a shipment of setup aluminum tanks which moved from Mira Loma, Calif., to Walker Air Force Base, N. Mex., during June 1958.

The charges billed and collected by the carrier were based on the actual weight of 12,260 pounds to which there was applied a rate of $16.08 per 100 pounds, resulting in the total paid charges of $1,971.41.

The carrier's tariff authority is listed as well as the National Motor Freight Classification. The authority for the carrier's charges, briefly, was based on an exceptions rating three times first class on any quantity of freight.

The establishment of this exceptions rating removed the application of the class rating. The establishment of the exceptions rating also precludes the availability of the classification rate basis, without special provision in tariff otherwise for interchangeability or alternation of the exceptions with the class ratings.

So, bearing in mind that the Interstate Commerce Commission has, in many cases, found that an exceptions rating which is higher than the classification rating basis an abnormality or a situation which requires special justification, and to which generally, a presumption of unreasonableness attaches, we computed the charge basis which was believed to be allowable in the event there was a contest over the reasonableness of the exceptions rating basis which was charged and collected by the carrier.

This computation, of course, is for the specific purpose of our study, that is, we estimate that this is the amount of damages that the Government has probably suffered in connection with this particular shipment.

Our charge basis, which we feel the Government could establish in a proper proceeding before the Interstate Commerce Commission in the event there was available reparation authority, was based on a rate of $5.20 per 100 pounds, as compared to the $16.08 rate charged by the carrier, on the actual weight of 12,260 pounds, resulting in a total charge of $637.52.

We took advantage, for the purpose of this computation, of the classification rating of second class and the volume minimum weight of 12,000 pounds or actual weight.

In this case the difference between the charges paid and collected and the charges which we believed could be established as the lawful maximum basis, in the event reparation authority was available, was $1,333.89. This is one shipment.

We felt that we should restrict the examples that are made available here. There are many.

This particular one, while it was not specifically selected, nor was it selected at random, does reflect that there can be a considerable difference between the legally applicable charge basis and that which might be found to be the lawful maximum basis.

I would like to discuss, in addition, one more example if time permits.

Mr. STAGGERS. Go ahead.

Mr. CIMOKOWSKI. And this follows the statement, the narrative statement, which ends with page 10, and it begins on the sixth page after page 10.

The caption is "Through rate higher than aggregate of intermediate rates."

Mr. STAGGERS. How many pages after page 10?

Mr. CIMOKOWSKI. The sixth page following page 10, Mr. Chairman.

Mr. STAGGERS. All right. Go ahead.

It is captioned "Through rate higher than aggregate of intermediate rates." And the number "2" appears at the top of the page.

This situation has long been condemned by the Interstate Commerce Commission and the courts in their consideration of complaints against rail carriers, under part I of the Interstate Commerce Act. Similarly, after part II of the act became law in 1935, complaints against motor carriers were upheld on this basis. Whenever a through rate is higher than the combination of rates between particular points of origin and destination on railroad routes it is deemed prima facie unreasonable. The railroads must then present evidence explaining why the particular through rate is not unreasonable.

Prior to the *T.I.M.E.* case, the Interstate Commerce Commission gave effect to the principle of the railroad cases in considering various complaints of shippers by motor common carriers.

Two motor carrier cases are mentioned which were decided by the Interstate Commerce Commission in 1956.

When a one-factor through rate is published in a tariff to apply between any two points it is the legal rate and must be applied and collected in the absence of any tariff provision permitting the substitution of a different rate. The lawfulness of the legal rate, that is, its unreasonableness, is still open to attack, however, and under part I of the Interstate Commerce Act covering railroads a shipper is authorized to file a complaint with the Commission disputing the lawfulness of the legal through rate and asking for damages or reparation measured by the difference between the legal rate and such lower lawful or reasonable rate as may be established after hearing on the shipper's complaint.

Under the principle of the *T.I.M.E.* case, a shipper by interstate motor common carrier whose operations are subject to part II of the act as presently constituted does not have an equivalent right to sue for reparation, that is, he cannot obtain damages on past shipments. His remedy is limited to prospective shipments only. If he succeeds in establishing unlawfulness, he will benefit only when particular unlawful tariff provisions are corrected pursuant to Commission order or through the carrier's voluntary action, and therefore become the legal charge basis as to shipments made thereafter.

Attached is a statement of an actual motor carrier case illustrating the unreasonable rate situation described above which is representative of many similar instances found in the General Accounting Office audit.

This tabulation concerns a shipment of sugar from Lyoth, Calif., to Fort Huachuca, Ariz., during December 1954.

The charges paid to the motor carrier were based on the through rate of $1.82 per 100 pounds applied to the actual weight of 70,700 pounds, resulting in a total charge paid of $1,286.74.

This charge was computed on the basis of the tariff authority shown which contained the joint through rate.

In our audit of this matter we found the combination of rates or an aggregate of intermediates which, when taken together, would result in a lower through rate and a lower through charge than that applied by the carrier which is, as I have indicated, the legal charge and cannot be overthrown.

Nevertheless, in our examination we used a combination of rates constructed over Tucson, Ariz., producing a rate of $1.55 per 100 pounds, as compared to the rate of $1.82 per 100 pounds charged by the carrier, and resulting in a total charge paid of $1,095.85.

And the difference in charges, that is the difference which we in the General Accounting Office believe would have a very good chance of being sustained as unreasonable or an excess portion of the total charge collected by the carrier, was $190.89.

Mr. Chairman, and members of the subcommittee, this concludes my statement. We would be glad to answer any questions that you may have.

Mr. STAGGERS. Did I understand you to say that the Government was the largest shipper on these?

Mr. CIMOKOWSKI. That is my understanding, sir.

I read these statements from time to time but never, personally, have made a statistical analysis of the Government's position as a shipper, in terms of total money spent.

I do know that roughly about $2 billion are expended on transportation charges for carrier services furnished the U.S. Government on an annual basis.

I would estimate this as a rough guess.

Mr. STAGGERS. Well, I wondered there if you were taking into consideration the military in that or just the other Government agencies?

Mr. CIMOKOWSKI. I am thinking of the entire shipping functions of the Government departments and establishments.

In other words, the Department of Defense and what it needs in the way of transportation services to get its materials and its equipment and personnel from place to place, the Department of Agriculture and its related corporations such as Commodity Credit Corporation, various other civil agencies, and the General Services Administration, of course, which does most of the business, in the way of traffic management, for the Government civilian agencies.

Mr. STAGGERS. Do you know whether the military services have a representative here to testify?

Mr. CIMOKOWSKI. I am not aware that there are any present, but the fact that I do not recognize someone does not necessarily mean that the services are not represented.

Mr. STAGGERS. I did not notice them on the witness list. Maybe they might be here.

I am just trying to go a little further here.

Are they under the same rates that you are, the same system of making rates or do they have any other recourse?

Mr. CIMOKOWSKI. Well, sir, they are subject to the same published and filed tariffs, tariffs that are applicable to shipments made by private shippers, commercial shippers, generally, with the exception that under section 22 of the Interstate Commerce Act, and under part II, by reason of a cross reference to section 22, the motor carriers and rail are permitted to quote rates lower than those published in filed tariffs.

Mr. STAGGERS. That was passed about two Congresses ago, I believe, was it not?

Mr. CIMOKOWSKI. Section 22 has been in the act since it inception, in the Interstate Commerce Act.

Mr. STAGGERS. I mean, it was amended——

Mr. CIMOKOWSKI. It was amended in 1958 by Public Law 85–762, sir.

In that amendment the primary concern appeared to be time limitations that should apply on Government shipments and also time limitations upon actions to be taken either by the carrier or the Government in court or with the General Accounting Office.

Prior to the amendment in Public Law 85–762 the carriers had 10 years on all Government transactions in which they engaged, to file claims with the General Accounting Office.

The Government and the General Accounting Office had no limitation upon set-off action nor was there any limitation upon suit in the event it decided or determined that suit against a carrier was warranted.

After the amendment, of course, the right to set-off in the Government and the right to file claims with the Government was limited to 3 years after certain events, which are more explicitly described in the law.

Mr. STAGGERS. Mr. Friedel?

Mr. FRIEDEL. Mr. Cimokowski, in your statement or through your statement you referred to T.I.M.E. and Davidson.

Mr. CIMOKOWSKI. Yes, sir.

Mr. FRIEDEL. For the record, I would like to have the initials explained as to who they are and what they are. The "Davidson" strikes a familiar note.

I want to know if it is the Baltimore concern.

Mr. CIMOKOWSKI. Yes, sir.

Mr. FRIEDEL. Would you explain that case?

Mr. CIMOKOWSKI. Well, I will try to report what I know.

The explicit facts of those two cases, I will try to give you what I know.

T.I.M.E. was the principal litigant in the two cases. The *Davidson* case, while on an equal level, so far as importance was concerned, did not receive, I do not think, as extensive consideration in the final analysis as the *T.I.M.E.* case which involved an aggregate of intermediates being lower than a through rate collected by the carrier.

Mr. FRIEDEL. What do the initials stand for, T.I.M.E.?

Mr. CIMOKOWSKI. That is capital T.I.M.E.

Mr. FRIEDEL. Yes, I would like to know what that stands for.

Mr. CIMOKOWSKI. I do not know.

Mr. MCNEILL. That is the trade name of the company.

Mr. CIMOKOWSKI. It is probably taken from the full name of the company as many businesses are wont to do.

Mr. FRIEDEL. All right. Now, one more question:

In your first memorandum or first analysis of the rate charges you refer to shipments of setup aluminum tanks and you state that they charged $16.08, and you felt that that was not the proper charge.

My question is this: Doesn't the shipper find out what the charges are going to be before he ships?

Mr. CIMOKOWSKI. Well, the shipper knew or I must assume that he was aware because of the tariff publication, that he would be charged $16.08 per 100 pounds for that movement.

But the fact that the shipper is aware of what the charge is does not, under part I of the act, preclude him from taking issue with the lawfulness of that rate. So long as the rate is contained in the tariff and made public in that way, that is the rate that must be applied.

It is like a statute. In other words, it must be applied in the same way that it is written and the only way it can be contested or possibly adjusted is through a proceeding in which the shipper would undertake to prove that the rate so charged is unreasonable to whatever extent might be established.

Mr. FRIEDEL. Isn't that done?

Do they not try to negotiate before and explain that the rate is unreasonable and ask that they apply the old rate?

Mr. CIMOKOWSKI. Well, the shipper——

Mr. FRIEDEL. I do not know, but I just want to develop it.

Does the shipper just ship because he thinks the rate is so and so and say "OK." Then later on when he finds out more about it and feels that it is unreasonable, he decides to contest it. Why doesn't the shipper mention to them in the first place that it is too high?

Mr. CIMOKOWSKI. Yes. In this particular situation where we use a classification basis as opposed to the exception rating basis, it is very possible that the shipper actually doing the shipping, who might be far removed from the traffic management office, has absolutely no knowledge of what the rate might be.

He is interested in obtaining the service and in getting, in this case, military goods from one station to another. And notwithstanding that, even if he does know what the rate might be, he might not be aware at that time that the rate as charged possibly might violate some principle of lawful maximum basis.

And he has that right reserved to him under part I to go to the Commission, to the ICC, and attempt to establish that he is entitled to damages which would be measured by the difference between the legally applicable rate and the rate which he says is lawful or the lawful maximum rate basis.

Very often, in this kind of a case, in the classification versus exceptions basis, the carrier, I believe, is at a disadvantage in that there is a presumption of unreasonableness which attaches at the outset. It is up to him to overcome that presumption.

Do I answer your question, Mr. Friedel?

Mr. FRIEDEL. In a way, but I still cannot imagine a shipper, whether he is far removed or not, not having some carrier to make that shipment.

This is the Government and they probably have experts. They should know whether the rate is right or not and if it is not right they should say, "You are out of line and we feel so and so," and maybe they will make the right adjustment at the time, and that would prevent litigation later on.

That is the way I would do it, in a businesslike way, and I would imagine that many others would too.

Mr. CIMOKOWSKI. Sir, may I answer your question now, Mr. Friedel?

Mr. FRIEDEL. Surely.

Mr. CIMOKOWSKI. In that case the carrier is obliged, he is required by law, to charge that tariff rate without deviation from it and in order to make arrangements for a different rate basis it would be necessary for him to file in the way required under the regulations of the Commission and under the statutory provision, an amendment to his tariff which would afford the shipper the reduced basis or, in the alternative, the shipper might find it expedient to attack the reasonableness of that rate after the time that he has paid the charges.

But at the time of the actual contact between shipper and carrier there is very little that can practically be done in the way of adjustments except that in the case of the United States, if the carrier so decides, it is authorized to quote a rate lower than that which is published in the tariff.

Mr. FRIEDEL. Am I correct in quoting your statement that that $16.08 was a legal rate?

Mr. CIMOKOWSKI. That is right, sir.

Mr. FRIEDEL. The carrier charged the legal rate and the shipper thought that it should not be that much.

But what I am trying to do now is to find out: Would we be starting a cutthroat business if that is the legal rate established and we authorize them to charge only the "lawful maximum."

Then you will have other carriers coming in and saying, "Well, this is a legal rate and if we cut it down we might be starting another price war."

Mr. CIMOKOWSKI. Well, there are some technical niceties that often confuse me, sir, and one of them is the distinction that must be made between what is legal and what is lawful in rate and transportation parlance.

When a rate or a tariff provision is put in the tariff this is denominated the legal basis, that is, it must be applied except as the parties might, by availing themselves of procedures afforded under the act, change that particular legal basis at a later time.

It cannot be done automatically.

The lawful basis, on the other hand, is what the carrier might be entitled to in the way of compensation with a reasonable profit, and what the shipper might be entitled to in fairness and in equity, to a rate or in the way of a rate to be applied upon his particular transportation.

He might be paying the legal rate which might be considerably more than applicable and paid in other territories by his competitors,

for example, on similar articles and transported under similar conditions.

Mr. FRIEDEL. Well, as I understand your statement, they did charge the legal rate but you felt or, whoever it was, felt that they should not be charged that under the tariff here.

Mr. CIMOKOWSKI. Yes, sir.

Mr. FRIEDEL. Now, who is to determine whether the legal or lawful rate should apply?

You can change the classification. We set it up one way, under one tariff legally, and if the shipper feels that it should be under another classification or another section then we will always be at war, will we not?

Mr. CIMOKOWSKI. It does not happen that frequently. I mean, sir, by and large, the great majority of the rates are legal as well as lawful, but there are frequent occasions when the shipper believes that he is being charged more than is reasonable and under part I of the act he may go to the ICC and complain about the unreasonableness of a particular rate or charge that may be assessed upon his transportation.

Mr. FRIEDEL. Thank you.

Mr. STAGGERS. Mr. Cimokowski, I would like to ask this in relation to what Mr. Friedel has had to say.

I think it raises a question there. Can the shipper at the time of contracting bargain with the carrier, or not that carrier but other means of transportation if it is available?

Mr. CIMOKOWSKI. No, sir; not ordinarily.

The Government stands in the same position as the commercial shipper in this respect until the carrier offers the Government some rate basis lower than that which is contained in the published and filed tariff by reason of or by virtue of section 22 of the Interstate Commerce Act.

But, ordinarily, and in most cases there isn't any bargaining or negotiation in order to reach an arrangement which is lower than the tariff charge basis. This would be a violation of the law and result in exposure to the penalties and punitive measures that are provided in the Interstate Commerce Act.

Mr. STAGGERS. Well, I just wondered this then: If there are other means of transportation, that they would all have the same rate. Is that right?

Mr. CIMOKOWSKI. No, sir. Competition still exists where the geographical and other conditions permit, that is, if the particular capabilities and efficiencies of other modes of carriage lead the management of those other modes to conclude that they can undercut and publish and file with the Interstate Commerce Commission a rate different from the competing mode of transportation—this goes on all the time.

I mean, they are perfectly authorized to do that, with the reservation, of course, as to whether or not there might be some suspension action taken on protest of properly authorized persons or organizations.

Mr. STAGGERS. Well now, what I was trying to get in, following up Mr. Fridel's questions, was the shipper would have the right to shop around and see if there are other modes of transportation that are cheaper and what I think he was insisting upon was that the Gov-

ernment agency should have experts that would do that and get the cheapest mode of transportation.

Mr. CIMOKOWSKI. Oh, they can't shop around, sir. They cannot shop around except to the extent that competing modes of transportation are available.

Mr. STAGGERS. That is what I am talking about, if it is available. I mean, they certainly not only have the right but it is their duty, I think is what Mr. Friedel was talking about.

Mr. CIMOKOWSKI. That is right, sir. And under all circumstances the shipping agencies of the Government are enjoined to take advantage, where the transportation meets its needs, of the most economical transportation.

Mr. STAGGERS. Well, you have given in this case that they charged $16 and some cents through transportation and, following it up, would it be legal to take the other mode of transportation?

Mr. CIMOKOWSKI. Yes, it would. I mean if the traffic manager decided that he would like to move his shipment by two modes of transportation, part of the way being motor carrier or rail, and the rest of the way, water, it is authorized under the law.

Mr. STAGGERS. Well, I think what his intentions were: Would not that be the duty then of the Government agency unless it was necessary that it be expedited by the quickest means, to take the cheapest means that could be taken to transport these Government——

Mr. CIMOKOWSKI. Yes, Mr. Chairman. I would be their duty to do so, and I am sure that the shipping officers of the Government have in mind constantly that they will utilize the most economical means of transportation that is best designed to meet their particular needs at that time.

Mr. STAGGERS. But in this case I presume that it was necessary to expedite it or there was not means at hand to take it piecemeal through or something like that?

Mr. CIMOKOWSKI. Of course, I do not know what the particular facts behind the record that we have might be.

Mr. FRIEDEL. Are you referring to the second illustration he made where they had a through carrier?

Mr. CIMOKOWSKI. Yes, sir.

Mr. FRIEDEL. It costs more to have a through carrier. If they used two carriers it would cost less but in that particular instance there might have been a 2-, 3-day or a week's delay.

They wanted it early, and you felt that they should have been charged the cheaper rate although it went through first class.

Mr. COLLIER. Will the gentleman yield?

Mr. FRIEDEL. Yes.

Mr. COLLIER. In the GAO study of the rate charge practices did you find that the shipper, in each instance, or in most instances, designated the carrier or did you find in some instances that the contracting office designated the carrier?

Mr. CIMOKOWSKI. This is my understanding, sir.

In large movement shipments where large quantities are involved, the shipping office, the agency of the Government which is responsible for prescribing the method of shipment and arranging all the details with regard to getting the materials or the equipment to destination, usually gives the shipping instructions to the shipper which

might be a contractor, a commercial organization, or a Government installation of some sort.

Mr. COLLIER. In how many instances in this study, and I know you cannot pin them down with exactness, were these shipments involved on the basis of the contracting on an f.o.b. destination or at f.o.b. origin point?

This, I think, is important.

Mr. CIMOKOWSKI. Mr. Collier, it is difficult to answer that question. We, in the General Accounting Office, would like to see most purchases, large purchases, moving in carload or truckload lots, made on an f.o.b. origin basis, so that the freight charges assessed and collected by the carriers could be examined to the extent that the GAO could audit the transportation accounts when the vouchers, which are paid by the administrative office without prior audit under authority of the present law, come in.

So that when they reach our office we will have an opportunity to determine whether or not there are any overpayments or there is any facet of the transportation charges being paid by shipping agencies of the Government to the various modes of transportation which should be known.

Mr. COLLIER. It would seem to me that in those instances, where the contract was let on an f.o.b. destination basis, it would be getting into the jurisdiction of the Renegotiation Board.

Mr. CIMOKOWSKI. In the case of purchases made on an f.o.b. destination basis we usually wouldn't have any concern with the transportation charges, that is the General Accounting Office would not actively consider the individual accounts that might be paid for the transportation under those types of contracts, because we would not audit those transportation accounts, sir.

Mr. COLLIER. And in that type of contract then the legislation which we are dealing with would not apply?

Mr. CIMOKOWSKI. Not ordinarily, no, sir, insofar as the point of view of the United States is concerned.

If we purchase on an f.o.b. destination basis—if the shipping or procurement agency purchases on an f.o.b. destination basis—without reserving any right to pay the transportation charges or use its own shipping documents, then the Government wouldn't be interested in what the transportation charges were.

It is interested only to the extent that it considers bids being made to the procurement agency and has to arrive at a determination of the lowest bid available, which includes the price of the material and the price of transportation.

Mr. COLLIER. One other question: We all know there are certain places in the country where many modes of transportation are more available than others.

And so we can readily understand that there are problems unique in this business of selecting a carrier, but it would seem to me that in those areas where competition for freight business is very tough, and I do not think there are many businesses today that are more competitive than the freight carrying business, that this problem should not develop in Baltimore or Chicago where you do not have this problem and where any competent router of freight would be able to determine where the best rate would be available. Yet, one carrier might inter-

pret the rate under one classification and the second, under a different classification.

Mr. CIMOKOWSKI. Well, first, Mr. Collier, usually, and the general principle is that there is only one legal rate and while there may be a difference of opinion as to the particular applicable classification or other charge basis——

Mr. COLLIER. Excuse me, sir. There is more than one legal rate?

Mr. CIMOKOWSKI. There is only one legal rate by——

Mr. COLLIER. One lawful rate but more than one legal rate?

Mr. CIMOKOWSKI. No, sir. There is only one legal rate that may be applied.

Mr. COLLIER. But there are many lawful rates?

Mr. CIMOKOWSKI. There might be variations in the lawful rate, yes, sir.

Might be variations from the legal rate. Let me amplify it a little more, if I may. When I say there is only one legal rate, I, first of all, would like to limit that statement to the particular mode of carriage which is involved or the particular carrier.

For the account of any one particular carrier at any one time there must be only one legal rate. Sometimes there are arguments between shippers and carriers as to the availability of two or more equally applicable rates.

And in those instances, under the principles of Commission-decided cases, the shipper normally would be entitled to the lowest basis.

If two or more are equally applicable the shipper would get the benefit of the lowest available basis.

Mr. COLLIER. I have already imposed too much on your time but just a final question:

Do you think that the cost of litigation that might be involved in any broad number of these cases would entail a greater expense than the savings that might be involved based upon the figures which you gave would seem to reflect a decline in the volume of overcharges?

Mr. CIMOKOWSKI. The response to that, I think, would be speculative.

I would say though that, affording the shipper a right to petition the Commission for adjustment of the charges is the most economical method or remedy that could be made available.

And in many instances, as pointed out by Commissioner Hutchinson, prior to the *T.I.M.E.* case, adjustments were often made on an informal basis which would eliminate much of the high cost attendant upon formal proceedings.

We, in the General Accounting Office, have considered the outlook or the prospect of higher costs of litigation as against the damages to be obtained in the way of reduced rate or charge bases, and we have contemplated that in the event it becomes necessary to expand our inquiry—and assistance to the agencies primarily responsible for pursuing the remedies—we would set a floor; that is, a minimum dollar figure. For example, if there wasn't any prospect of recovery by other means, we would limit actions to instances where more than $150 in any particular case was involved. We would consider anything below that as being economically impractical.

Mr. COLLIER. Thank you very much, sir.

Mr. STAGGERS. Mr. Jarman?

Mr. JARMAN. At the present time is there no practical way for the Government to try to recover the damages that you have estimated in the *Aluminum Tank* case and the *Sugar* case?

Mr. CIMOKOWSKI. No, sir. This has, to put it in the vernacular, gone by the boards.

These are amounts which, if capable of being formally established, have been lost forever.

Mr. JARMAN. You mean because there is no remedy?

Mr. CIMOKOWSKI. That is right.

Mr. JARMAN. Because of the statutory limiations?

Mr. CIMOKOWSKI. No, because of the absence of a remedy similar to that provided in appropriate provisions under part I of the act, covering railroads, making available to the shipper a right to recover reparation upon proper proof.

Mr. JARMAN. There is no forum——

Mr. CIMOKOWSKI. There is no forum at the present time.

Mr. JARMAN (continuing). To which the shipper can now go to raise the issues?

Mr. CIMOKOWSKI. In the view of the Supreme Court in the *T.I.M.E.* case, there is no present forum for pursuing such a remedy.

Mr. JARMAN. If these shipments had been made by railroads or other carriers under part I or by water carriers under part III, what would be your practical approach to the problem?

Mr. CIMOKOWSKI. Some time ago we embarked upon a program, incident to the examination of the transportation accounts submitted to our office, for the referral to Government agencies of specific instances of what appear to be unreasonable rate situations.

We have sent to the General Services Administration, in the exercise of its functions under the Federal Property Administrative Services Act and in pursuance of the rights of civilian agencies, to the Defense Department in the case of military transactions, and to the Department of Justice, a number of unreasonable rate situations and recommended that they act by way of filing complaints.

And they have so filed, in several instances, complaints with the Commission.

Mr. JARMAN. That would lead——

Mr. CIMOKOWSKI. That is under part I of the act. Yes, sir.

Mr. JARMAN. How about legal remedy through the courts?

Mr. CIMOKOWSKI. Well, normally we do not find it necessary to recommend that the Government institute or instigate particular litigation for the recovery of unreasonable charges.

The ICC, of course, is the body that has primary jurisdiction in matters of unreasonable rates. And the courts, if presented with such a case, under the present conception of the mechanics of the law, are required to afford opportunity to refer an unreasonable rate situation to the Commission.

So, normally, we will not refer an unreasonable rate situation to the Department of Justice for court action against a carrier under part I of the act.

We would go to the Commission instead.

Mr. JARMAN. Chairman Hutchinson said in his statement that it should be emphasized that reparation procedures before the Commission are more simple and less expensive than actions in court to obtain the same end.

From what you have said and from the statement from Chairman Hutchinson, the normal approach of the shipper who feels that he has suffered damages is directly to the Commission itself?

Mr. CIMOKOWSKI. Yes, sir. That is my understanding.

Mr. JARMAN. The position you take today is that there is every reason, in your opinion, for a uniformity of approach?

Mr. CIMOKOWSKI. Exactly.

Mr. JARMAN. On all carriers?

Mr. CIMOKOWSKI. Yes, sir.

As we see it, there is no reason why there should not be uniformity.

Mr. JARMAN. Thank you.

Mr. STAGGERS. Mr. Divine?

Mr. DEVINE. Do you know of any particular reason why the motor carriers have been excluded from this law, whereas your rail carriers and the others have been under it, for some years?

Mr. CIMOKOWSKI. Well, Mr. Devine, in the *T.I.M.E.* case there is a majority opinion and a dissenting opinion, or a minority opinion, and both sides of the court undertake to examine the legislative history.

They seem to reach opposite conclusions, however, as to what was being considered, and what was being recommended at any particular time.

As I remember, originally the Interstate Commerce Commission did endorse a proposal, a legislative proposal, of the nature similar to the one now reflected in H.R. 5596. It was at that time—it was 1949. I will correct myself, because it was part of, or an incident of, a broader proposal which contemplated also the placing of limitations upon actions against motor carriers for over overcharges.

At that time Congress finally passed the bill, the provisions with regard to reparation being eliminated.

Mr. DEVINE. As to motor carriers?

Mr. CIMOKOWSKI. As to motor carriers. At that time this was a motor carrier bill.

Mr. DEVINE. I see.

Mr. CIMOKOWSKI. There was considerable activity in the latter part of the 1940's for amending the Interstate Commerce Act, part II of the act, so as to limit the time for actions against motor carriers for overcharges.

Before that time there was controversy as to what applied in the way of limitations and so as to make certain that the limitations should be the same as in part I the law was passed in that form.

Mr. DEVINE. Do you find a lot of resistance from the motor carriers to this legislation?

Mr. CIMOKOWSKI. Well, I have heard of none. Mr. Wilson called my attention to an article in Transport Topics of February of this year in which no statement of opposition was made, but an article printed in 1957 was reproduced, or part of an article printed in 1957 was reproduced, showing that a law of this nature might have some adverse effect on the smaller carriers.

Mr. DEVINE. On another tack here: I have heard you use the term "lawful" and the term "legal" interchangeably, and I was wondering if you would give this committee the benefit of the difference in those two terms as far as the GAO is concerned.

Mr. CIMOKOWSKI. Well——

Mr. DEVINE. I think I am the only lawyer sitting on this subcommittee at the moment and I would like to have the benefit of your distinction.

Mr. CIMOKOWSKI. Some times I think the more I undertake to explain and the more elaborate the explanation becomes, the more difficult it is to understand. But, nevertheless, I could start out, I suppose, by saying a legal rate is the rate which is published in the tariff and filed with the ICC.

Now, that legal rate may also be lawful in that it does not violate any other provision of the Interstate Commerce Act.

It may violate, that particular legal rate may violate, the section of the act, which is section 1, paragraph 5, as I remember it, which inhibits or prohibits unreasonable charges or enjoins the carriers to charge no more than reasonable, and states that something unreasonable is unlawful.

So we start out with a legal rate which may be lawful but if it is in violation of section 1(5) or section 2 or section 3 or section 4 of the Interstate Commerce Act, which cover varying situations, then it may be unlawful and remedies are made available to the shipper for correction of those things.

Mr. DEVINE. I have been corrected.

My colleague from Oklahoma is also a lawyer and I believe you talk like a lawyer, too.

Mr. CIMOKOWSKI. Yes, sir.

Mr. DEVINE. Well, I think we are dealing in a question of semantics.

Mr. CIMOKOWSKI. You always run into that and this question concerning legal and lawful is often asked. There is a certain synonymity but it is not absolute.

Mr. DEVINE. Now, when we get into this classification of whether something is unreasonable, who makes the final determination of that?

Mr. CIMOKOWSKI. The ICC, sir, is the body authorized to make determinations of the reasonableness or unreasonableness.

Mr. DEVINE. Then, if it is found to be unreasonable it is then unlawful?

Mr. CIMOKOWSKI. When there is a determination of unreasonableness the characterization of "unlawful" is proper.

Mr. DEVINE. Would that also be illegal?

Mr. CIMOKOWSKI. No, to the extent that the carrier and the shipper charged and paid the applicable published tariff rate.

It becomes—I think this may be true, and I certainly would not want to usurp anything the Commisison may have to say on this subject because I think they are more, much more, qualified to speak on it than I am—after an order of unlawfulness, the legality or illegality that may attach to the continuance of a particular criticized or condemned action would cause the invocation of other provisions of the act in the way of penalties.

Mr. DEVINE. Well, then, again, another possible——

Mr. FRIEDEL. May I add that I am confused?

Mr. DEVINE. Have you found in the limited scope in which your particular department has involved itself on this, perhaps dealing again with Government agencies, that perhaps transportation officers or persons dealing just in the transportation field and in selecting the

carriers, they may be involved in some possible payola? I do not like that term.

Mr. CIMOKOWSKI. I am not that close to the audit, to the actual audit of transportation vouchers coming through our Office, but in my 15 years with the General Accounting Office no such instance has come to my attention.

Mr. COLLIER. Will the gentleman yield?

Mr. DEVINE. Yes.

Mr. COLLIER. You said that the ICC will make the determination in answer to Mr. Devine's question.

Mr. CIMOKOWSKI. Yes, sir.

Mr. COLLIER. As to unreasonableness, however, there still is the alternative of bringing a suit for damages in a district court, is there not?

Mr. CIMOKOWSKI. Yes, sir.

As I would understand the *Western Pacific* v. *United States* case, decided in 1958, if the shipper does file his suit and it appears that a question of unreasonableness is involved, assuming that this is under part I of the act where reparation remedies are available, the court is obliged to refer the question of unreasonableness to the Commission. The shipper does have a right, to, in the first instance, to file suit in the district court, if necessary, if that is the appropriate court.

Mr. DEVINE. I have no further questions.

Mr. STAGGERS. If there are no further questions we wish to thank you, Mr. Cimokowski, and also your associates, Mr. Wilson and Mr. McNeill and Miss Rubar, and we wish to congratulate her on reaching this high position in the Office of the General Counsel.

It is rather unusual that a lady should come up here in the legal profession with such a high rank. We congratulate you and thank you.

Mr. WILSON. Mr. Chairman, to clear the record, in answer to Mr. Friedel's question, T.I.M.E., we are told, means The Intercity Motor Express.

Mr. FRIEDEL. Good.

Now, answer one more question, please, Mr. Chairman.

Mr. STAGGERS. Yes.

Mr. FRIEDEL. Could you tell us on your example here of a shipment from California, December 1954, whether there was a time element involved?

Mr. CIMOKOWSKI. No, I think it safe to assume that there was not a time element involved.

At least, this is immaterial to the consideration of the applicable and lawful maximum rate bases.

Mr. FRIEDEL. That is all.

Mr. STAGGERS. Thank you very much.

Mr. CIMOKOWSKI. Thank you, sir.

(The appendix to the statement of Mr. Cimokowski is as follows:)

APPENDIX TO STATEMENT OF EDWIN W. CIMOKOWSKI, ASSISTANT GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, ON H.R. 5596

This appendix contains examples of motor carriers' accounts audited by the General Accounting Office in which elements of unreasonableness were found. Four of the several categories of unreasonable charge situations are identified

and an explanation is furnished of the charge basis collected by the carriers and that considered by the General Accounting Office to be the lawful maximum charge basis on certain shipments. The examples herein set forth are related to comparable cases in which the Interstate Commerce Commission made a prior determination of unreasonableness or unlawfulness.

EXCLUSIVE USE OF VEHICLE RULE

In *Broderick & Bascom Rope Co.* v. *Hall Freight Lines, Inc.*, 302 I.C.C. 347 (1957), the Interstate Commerce Commission had for consideration a rule in an exceptions tariff which provided that the exclusive use of a vehicle would be furnished upon request of the shipper, and that the applicable charges on the shipment would then be those based on the published rate on the shipment, subject to a minimum charge on 12,000 pounds at the applicable first-class rate. The exclusive use charges on the less-than-truckload shipment there considered were more than 60 percent in excess of those applicable on a full truckload, which, as the shipper contended, would ordinarily have been accorded the exclusive use of the vehicle.

The Commission stated that, generally speaking, charges on a less-than-truckload shipment accorded the exclusive use of the vehicle should not exceed the charges applicable on a truckload shipment of the same commodity at the applicable truckload rate and minimum weight and, therefore, found the charges assessed under the exclusive use rule to be unjust and unreasonable to the extent they exceeded the truckload rate and minimum weight.

In some instances, however, our audit discloses a failure on the part of the carrier to comply substantially with pertinent tariff rules or other situations in which the exclusive rule involved is rendered inapplicable. Where the issue becomes one of applicability, as distinguished from reasonableness, the shipper is not prevented by the *T.I.M.E.* case from recovering the excess over the applicable tariff basis.

Attached is a statement concerning a shipment considered in our audit under an exclusive use rule procducing unreasonable consequences.

Less-than-truckload shipment of radio transmitting sets from Pomona, Calif., to Yorktown, Va., during October 1958

	Weight	Rate per 100 pounds	Charges paid	Tariff authority	Remarks
Charges as paid to carrier (exclusive use basis).	11,968 as 20,000	$11.14	$2,450.80	Item 935, Rocky Mountain Motor Tariff Bureau, tariff 20-B, MF-ICC 101 and 21-A MF-ICC 95.	Exclusive use of vehicle furnished. Item 935 of tariff 20-B specifies a minimum charge based on 20,000 pounds at the 1st-class rate.
			Charges		
Charges on basis considered lawful maximum.	11,968 as 18,000	7.81	$1,405.80	Class 70, truckload minimum weight 18,000 pounds. Item 34860, National Motor Freight Classification A-41, Rocky Mountain Tariff Bureau 21-A, MF-ICC 95.	Shipment was less than truckload. Charges computed on applicable truckload rate and minimum weight.
Difference			1,045.00		

NOTE.—The difference of $1,045 represents the estimated amount of damages to the shipper computed under the maximum reasonable basis found in *Broderick & Bascom Rope Co.* v. *Hall Freight Lines, Inc., et al.*, 302 I.C.C. 347 (1957).

U. S. GENERAL ACCOUNTING OFFICE
Transportation Division

Item or Line No. _____

REPORT OF OVERPAYMENT OF FREIGHT CHARGES
(See P.L. 85-762; 72 Stat. 860)

Exclusive use of vehicle rule

Carrier: Indianapolis K.C. Motor Express Bill No. 30658

Date of Payment: Month 11 Day 58 Year Vou. No. 268909 D/O RA Watson

Department: U. S. Navy G.A.O. Claim No. TK-

B/L No. N 154.7704 Shipment Date: 9-30-58 Delivery Date: 10-9-58

Origin: Pomona, California Destination: Yorktown, Virginia

Commodity Description: Radio Transmitting Sets

Car No. _____ Car Size: Ordered: _____ Furnished: _____

Route: _____
(Use full names of all carriers in route of movement)

Amount Originally Paid by CI TK 685190 5/5/60 . . . . . $ 2,450.80

Supplemental Payment: Date _____ . . . . . $ 1,045.00

Refund Deducted NRAO (FF) Vou. 367251 6/59 R.A. Watson accounts . . . . . $ 1,045.00

Overcharge: Date of Refund or Deduction: _____ . . $ _____

TOTAL AMOUNT PAID . . . . . $ 2,450.80

RATE AND CHARGES ON GOVERNMENT'S BASIS:

Actual or Minimum Weight 11968 as 18000 # Rate: 87.81 cwt. $ 1,405.80 $ _____

_____ $ _____
(Other)

TOTAL CHARGES . . . . . $ 1,405.80

OVERPAYMENT . . . . . $ 1,045.00

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Class 70, Truckload minimum weight 18,000 pounds, Item 34860 National Motor Freight Classification A-4, Rate per Rocky Mountain Motor Tariff Bureau Tariff 21-A, MF-ICC 95

(See Over)

BASIS FOR CARRIER'S CHARGES: (On information or belief)

Actual or Minimum Weight: 11968 lbs. as 22000 lbs. Rate: @ $11.14 Cwt.

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Rocky Mountain Motor Tariff Bureau 20-B, MF-ICC 101
(Item 935-Exclusive use)
Rocky Mountain Motor Tariff Bureau 21-A, MF-ICC 95
(1st class)

UNCOLLECTED OVERCHARGES:

Paid $_____ S/Be $_____ O/C $_____

Actual or Minimum Weight: _____ Rate _____

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

THROUGH RATE HIGHER THAN AGGREGATE OF INTERMEDIATE RATES

This situation has long been condemned by the Interstate Commerce Commission and the courts in their consideration of complaints against rail carriers, under part I of the Interstate Commerce Act. Similarly, after part II of the act became law in 1935, complaints against motor carriers were upheld on this basis. Whenever a through rate is higher than the combination of rates between particular points of origin and destination on railroad routes it is deemed prima facie unreasonable. The railroads must then present evidence explaining why the particular through rate is not unreasonable.

Prior to the *T.I.M.E.* case, the Interstate Commerce Commission gave effect to the principle of the railroad cases in considering various complaints of shippers by motor common carriers.

When a one-factor through rate is published in a tariff to apply between any two points it is the legal rate and must be applied and collected in the absence of any tariff provision permitting the substitution of a different rate. The lawfulness of the legal rate, that is, its unreasonableness is still open to attack, however, and under part I of the Interstate Commerce Act covering railroads a shipper is authorized to file a complaint with the Commission disputing the lawfulness of the legal through rate and asking for damages or reparation measured by the difference between the legal rate and such lower lawful or reasonable rate as may be established after hearing on the shipper's complaint. Under the principle of the *T.I.M.E.* case, a shipper by interstate motor common carrier whose operations are subject to part II of the act as presently constituted does not have an equivalent right to sue for reparation, that is, he cannot obtain damages on past shipments. His remedy is limited to prospective shipments only. If he succeeds in establishing unlawfulness, he will benefit only when particular unlawful tariff provisions are corrected pursuant to Commission order and therefore become the legal charge basis as to shipments made thereafter.

Attached is a statement of an actual motor carrier case illustrating the unreasonable rate situation described above which is representative of many similar instances found in the General Accounting Office audit.

Shipment of sugar from Lyoth, Calif., to Fort Huachuca, Ariz., during December 1954

	Weight	Rate per 100 pounds	Charges paid	Tariff authority	Remarks
Charges as paid to carrier (through rate basis).	70,700	$1.82	$1,286.74	Item 40840, National Motor Freight Classification 12, MF-ICC 4. Interstate Freight Carriers Conference Tariff 1-D, MF-ICC 3.	Charges computed on through rate higher than combination rate over same route.
			Charges		
Charges on basis considered lawful maximum (combination rate).	70,700	[1] 1.11 [2] .44	$1,095.85	Item 3640, Interstate Freight Carriers Conference Tariff 1-D, MF-ICC 3. Arizona Motor Tariff Bureau Tariff 2, MF-ICC 75.	Charges computed on a combination rate constructed over the route of movement.
Difference			190.89		

[1] To Tucson, Ariz.
[2] Beyond.

NOTE.—The difference of $190.89 represents the estimated amount of damages to the shipper computed under the maximum reasonable basis found in *Toledo Steel Tube Co.* v. *Cleveland & Chicago Motor Express Co.*, 66 M.C.C. 448, 450 (1956).

U. S. GENERAL ACCOUNTING OFFICE
Transportation Division

Item or
Line No.

REPORT OF OVERPAYMENT OF FREIGHT CHARGES
(See P.L. 85-762; 72 Stat. 860)

Aggregate of intermediate rates lower than through rates via same route.

Carrier: Western Truck Lines Bill No. 10/1/13/4

Date of Payment: Month Feb. Day 2, Year 1955 Vou. No. 257102 D/O S. Gaddis

Department: Army G.A.O. Claim No. TK-691494

B/L No. MY 4509810 Shipment Date: 12/21/54 Delivery Date: 1/4/55

Origin: Lyoth, California Destination: Fort Huachuca, Arizona

Commodity Description: 400 bags Sugar, beet or cane, other than raw-cross-referenced to bill of lading MC 4509811

Car No. Car Size: Ordered: Furnished:

Route: Fortier Transportation Company-Western Truck Lines
(Use full names of all carriers in route of movement)

Amount Originally Paid . . . . . $ 735.28

Supplemental Payment: Date 9/30/60 . . . . . $ 109.08

Refund . . . . . $

Overcharge: Date of Refund or Deduction: 11/18/57 . . $ 109.08

TOTAL AMOUNT PAID . . . . . $ 735.28

RATE AND CHARGES ON GOVERNMENT'S BASIS:

Actual or Minimum Weight 40400 Rate: *1.55 $ 626.20 $

$
(Other)

TOTAL CHARGES . . . . . $ 626.20

OVERPAYMENT . . . . . $ 109.08

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

*1.11 To Tucson, Arizona
Interstate Freight Carriers Conference Local and Joint Freight
Tariff 1-D-MF-I.C.C. No. 3
Item 3640 Commodity Rate 40000 lbs. volume
.44 Beyond (Intermediate to Bisbee Arizona)
*1.55 National Motor Freight Classification No. 12, MF-I.C.C. No. 4
Item 40840 5th class 40000 lbs. volume
Arizona Motor Tariff Bureau Local and Joint Freight Tariff No. 2, MF-I.C.C. No. 75
Item 670 Provides intermediate application

T-145 (Rev. 10/14/60) (See Over)

BASIS FOR CARRIER'S CHARGES: (On information or belief)

Actual or Minimum Weight: 40,000 Rate: $1.82

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

National Motor Freight Classification No. 12, MF-I.C.C. No. 4
Item 40840 5th class 40000 lbs. volume

Interstate Freight Carriers Conference Local and Joint Freight Tariff 1-D, MF-I.C.C. No. 3

UNCOLLECTED OVERCHARGES:

Paid $_____ S/Bs $_____ O/C $_____

Actual or Minimum Weight: _____ Rate _____

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Status of Current Rates - 5/18/61

Current Aggregate Rate
$1.36 To Tucson, Arizona
Interstate Freight Carriers Conference Local and Joint Freight
Tariff 1-E, MF-I.C.C. No. 7
Item 5640 Commodity Rate 40000 lbs. volume
.65 Beyond
$2.01 National Motor Freight Classification No. 15, MF-I.C.C. No. 2
Item 40840 5th class 40000 lbs. volume
Arizona Motor Tariff Bureau Local and Joint Freight Tariff No. 2,
MF-I.C.C. No. 75

Current Thru Rate as Claimed by Carrier

$2.36 National Motor Freight Classification No. 15, MF-I.C.C. No. 2,
5th class, 40,000 Volume
Interstate Freight Carriers Conference Local and Joint Freight
Tariff 1-E, MF-I.C.C. No. 7

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U. S. GENERAL ACCOUNTING OFFICE
Transportation Division

Item or
Line No. _____

REPORT OF OVERPAYMENT OF FREIGHT CHARGES
(See P.L. 85-762; 72 Stat. 860)

Aggregate of intermediate rates lower than through rates via same route.

Carrier: Western Truck Lines Bill No. 19/1/13/A

Month Day Year
Date of Payment: Feb. 2, 1955 Vou. No. 257102 D/O S.Gaddis

Department: Army G.A.O. Claim No. TK- 691494

B/L No. MY 4509811 Shipment Date: 12/21/54 Delivery Date: 1/4/55

Origin: Lyoth, California Destination: Fort Huachuca, Arizona

Commodity Description: 300 bags Sugar, Beet or Cane Other than Raw-
Cross-referenced to bill of lading MY 4509810

Car No. _____ Car Size: Ordered: _____ Furnished: _____

Route: Fortier Transportation Company-Western Freight Lines.
(Use full names of all carriers in route of movement)

Amount Originally Paid . . . . . $ 551.46

Supplemental Payment: Date 9/30/60 . . . . . $ 81.81

Refund . . . . . $ _____

Overcharge: Date of Refund or Deduction: 11/18/57 . . $ 81.81

TOTAL AMOUNT PAID . . . . . $ 551.46

RATE AND CHARGES ON GOVERNMENT'S BASIS:

Actual or Minimum Weight 30300 Rate: *$1.55 $ 469.65 $ _____

_____ $ _____
(Other)

TOTAL CHARGES . . . . . $ 469.65

OVERPAYMENT . . . . . $ 81.81

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

* $1.11 to Tucson, Arizona
Interstate Freight Carriers Conference Local and Joint Freight
Tariff 1-D, MF-I.C.C. No. 3
Item 3640 Commodity Rate 40000 lbs. volume
.44 Beyond (Intermediate to Bisbee Arizona)
$1.55 National Motor Freight Classification No. 12, MF-I.C.C. No. 4
Item 40840 5th class 40000 lbs. volume
Arizona Motor Tariff Bureau Local and Joint Freight Tariff No. 2, MF-I.C.C. No. 75
Item 670 Provides Intermediate Application

T-345 (Rev. 10/14/60) (See Over)

BASIS FOR CARRIER'S CHARGES: (On information or belief)

Actual or Minimum Weight: 30300 lbs. Rate: $1.82

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

National Motor Freight Classification No. 12, MF-I.C.C. No. 4
Item 40840 5th class 40000 lbs. volume

Interstate Freight Carriers Conference Local and Joint Freight Tariff 1-D, MF-I.C.C. 3

UNCOLLECTED OVERCHARGES:

Paid $_____ S/Bs $_____ O/C $_____

Actual or Minimum Weight: _____ Rate _____

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Status of Current Rates - 5/18/61

Current Aggregate Rate

$1.36 To Tucson, Arizona
Interstate Freight Carriers Conference Local and Joint Freight Tariff 1-E, MF-I.C.C. No. 7
Item 5640 Commodity Rate 40000 lbs. volume

.65 Beyond

$2.01 National Motor Freight Classification No. 15, MF-I.C.C. No. 2
Item 40840 5th class 40000 lbs. volume
Arizona Motor Tariff Bureau Local and Joint Freight Tariff No. 2, MF-I.C.C. No. 75

Current Thru Rate as Claimed by Carrier

$2.36 National Motor Freight Classification No. 15, MF-I.C.C. No. 2, 5th class, 40,000 Volume
Interstate Freight Carriers Conference Local and Joint Freight Tariff 1-E, MF-I.C.C. No. 7

COMMODITY OR EXCEPTIONS RATES HIGHER THAN CLASS RATES

General speaking, rates are divided into three broad categories (1) class rates, (2) exceptions rates, and (3) commodity rates. Class rates are published in class-rate tariffs and are applied in accordance with different ratings (first class or class 1 being 100 percent and other classes being related thereto) named in freight classifications. Carload class rates are designed for occasional or sporadic movements. Exceptions to the classification may establish rules, regulations, or ratings different from those published in the classification and, although employing class rates, their use generally results in lower charges to the shipper. Commodity rates, which are as a rule the outgrowth of special conditions, are published to apply on a specific commodity or group of commodities and are almost invariably lower than class rates. On shipments of the same articles between the same points, rates derived from classification exceptions ratings ordinarily take precedence over rates derived from classification ratings and, in turn, commodity rates supersede the other two.

The Commission has held that the classification generally imposes the highest rate which a particular commodity should bear under normal conditions and a commodity rate which is higher than a class rate is an abnormality which on its face requires special justification. This applies with equal force to exceptions ratings which exceed the normal classification basis. Thus a presumption of unreasonableness attaches to such situations, in the absence of special or unusual circumstances. An example selected during the course of the General Accounting Office audit is contained in the attached statement.

Shipment of setup aluminum tanks from Mira Loma, Calif., to Walker Air Force Base, N. Mex., during June 1958

	Weight	Rate per 100 pounds	Charges paid	Tariff authority	Remarks
Charges as paid to carrier (exception-rate basis).	12,260	$16.08	$1,971.41	Item 455, Interstate Freight Carriers Conference Tariff 1-D, MF-ICC 3. Rule 26, National Motor Freight Classification 14.	Charges paid on exceptions rate of 3 times 1st class on any quantity of freight. Establishment of an exception rating removes the application of the class rating.
			Charges		
Charges on basis considered lawful maximum.	12,260	5.20	$637.52	Interstate Freight Carriers Conference Tariff 1-D, MF-ICC 3 and Item 88620, of National Motor Freight Classification 14.	Lawful charges computed on the classification rating of 2d class and volume minimum weight of 12,000 pounds.
Difference			1,333.89		

NOTE.—The difference of $1,333.89 represents the estimated amount of damages to the shipper computed under the maximum reasonable basis found in *Kalte* v. *Central Motor Lines, Inc.*, 61 M.C.C. 529 (1953); *Classification of Food Stuffs, viz: Chips*, 62 M.C.C. 679, 687 (1954).

U. S. GENERAL ACCOUNTING OFFICE
Transportation Division

Item or Line No. _____

REPORT OF OVERPAYMENT OF FREIGHT CHARGES
(See P.L. 85-762; 72 Stat. 860)

Commodity or exceptions rates higher than classification

Carrier: Navajo Freight Lines, Inc. Bill No. 2091-7118

Date of Payment: Month 7 Day 24 Year 58 Vou. No. 31507 D/O S. Gaddis

Department: Army G.A.O. Claim No. TK-

B/L No. AF8294539(Pro3688674) Shipment Date: 6/20/58 Delivery Date: 6/20/58

Origin: Mira Loma, California Destination: Walker A.F.B.,N.M.

Commodity Description: TanksAlum Su 18 Ga or thicker

Car No. _____ Car Size: Ordered: _____ Furnished: _____

Route: Navajo Freight Lines
(Use full names of all carriers in route of movement)

Amount Originally Paid . . . . . $ 2, 129.56

Supplemental Payment: Date _____ . . . . . $ _____

Refund 1003 issued . . . . . $ 158.15

Overcharge: Date of Refund or Deduction: _____ . . $ _____

TOTAL AMOUNT PAID . . . . . $ 1,971.41

RATE AND CHARGES ON GOVERNMENT'S BASIS:

Actual or Minimum Weight 12260 Rate: 5.20 $ 637.52 $ _____

Item Class $ _____

NMFC-14 88620 (Other) 2

TOTAL CHARGES . . . . . $ $,637.52

OVERPAYMENT . . . . . $ 1,333.89

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Interstate Freight Carriers Conference Tariff 1-D, MF-I.C.C. 3 Scale 1 Item 88620, National Motor Freight Classification 14 M/W 12,000 pounds, Class 2

T-345 (Rev. 10/14/60)

(See Over)

BASIS FOR CARRIER'S CHARGES: (On information or belief)

Actual or Minimum Weight: 12260 lbs Rate: 16.08

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Interstate Freight Carriers Conference, Inc. Tariff 1 D, MF-I.C.C. 3
Item 455 3x1 Any Quantity Scale 3

UNCOLLECTED OVERCHARGES:

Paid $_____ S/Be $_____ O/C $_____

Actual or Minimum Weight: _____ Rate _____

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

MINIMUM-CHARGE OR CAPACITY RULE

Some motor carriers have published minimum-charge rules in their tariffs to apply to single shipments which utilize more than the capacity of one vehicle. A carrier's vehicle is considered to be loaded to capacity when no more of the same article in the shipping form tended can be loaded thereon. The capacity rule in carrier's tariffs usually provides that when the equipment is loaded to capacity, the shipment will be subject to a minimum charge. This minimum charge is based, generally, on the truckload minimum weights and truckload rates, and frequently greatly exceeds the less-truckload charge which would have applied had the equipment not been loaded to capacity. In the absence of a provision for the alternative application of the less-than-truckload basis when the truckload basis is higher, the shipper must pay the higher charge.

The Interstate Commerce Commission has held that charges in excess of the less-than-truckload charges are unjust and unreasonable and that a minimum charge rule was and is "discriminatory, unjust, and unreasonable, and should be canceled" (*Royal Manufacturing Company, Inc.* v. *Huber & Huber Motor Express, Inc.*, 66 M.C.C. 237 (1955)).

Another version of the capacity rule treats each portion of a single shipment loaded to capacity of a vehicle as a separate shipment subject to the volume rate and minimum weight and, in this way, the revenue received by the carrier for the service is increased. (A volume minimum weight normally is applicable when a shipper tenders the volume minimum weight of a commodity at one time even though it may exceed the carrying capacity of the largest vehicle available and must be transported in two or more vehicles). Such a rule has been held by the Commission to be potentially discriminatory and unjust and unreasonable when motor carriers have the sole discretion in selecting the size of vehicles and manner of loading, since various combinations of sizes of vehicles coupled with capacity or noncapacity loading could vary the charges to be assessed on any given shipment (*Overflow and Minimum Charge Rule, Summit Fast Freight*, 61 M.C.C. 163 (1952); cf *Horsman Dolls, Inc.* v. *Riss & Co.*, 305 I.C.C. 669 (1959)).

An example of the situation is contained in the attached statement.

71703—61——4

Shipment of air compressors from Warner Robins, Ga., to Toledo, Ohio, during November 1958

	Weight	Rate per 100 pounds	Charges paid	Tariff authority	Remarks
Charges as paid to carrier (minimum charges).	5,400 as 22,000	$1.85	$407.00	Central & Southern Motor Freight Tariff Association tariff 100-A MF-ICC 140. Item 4550 (capacity rule and exception to minimum weight), class 85 per item 60280 of National Motor Freight classification A-4.	Single shipment utilizing 3 vehicles, 2 vehicles loaded to capacity. Fully loaded vehicles charged at truckload rate and minimum weight.
	5,400 as 22,000	1.85	407.00		
	3,600	1.85	66.60		
Total			880.60		
			Charges		
Charges on basis considered lawful maximum.	14,400	3.48	$501.12	National Motor Freight classification A-4, item 60280, class 85. Central & Southern Motor Freight Tariff Association tariff 100-A, MF-ICC 140.	Rated as less-than-truckload shipment.
Difference			379.48		

NOTE.—The difference of $379.48 represents the estimated amount of damages to the shipper computed under the maximum reasonable basis found in *Royal Manufacturing Company, Inc.*, v. *Huber & Huber Motor Express, Inc.* (66 M.C.C. 237 (1955)).

U. S. GENERAL ACCOUNTING OFFICE
Transportation Division

Item or
Line No. _____

REPORT OF OVERPAYMENT OF FREIGHT CHARGES
(See P.L. 85-762; 72 Stat. 860)

Capacity rule

Carrier: Mohawk Motor Inc. Bill No. 5055 a

Date of Payment: Month 12 Day 1 Year 58 Vou. No. 199825 D/O GBS

Department: Army G.A.O. Claim No. TK-

B/L No. AF 8221891 Shipment Date: 11-1-58 Delivery Date: 11-10-58

Origin: Warner Robins, Ga. Destination: Toledo, Ohio

Commodity Description: 8 Pcs. Compressors, Air

Car No. _____ Car Size: Ordered: _____ Furnished: _____

Route: _____
(Use full names of all carriers in route of movement)

Amount Originally Paid . . . . . $ 880.60

Supplemental Payment: Date _____ . . . . . $ _____

Refund . . . . . $ _____

Overcharge: Date of Refund or Deduction: _____ . . $ _____

TOTAL AMOUNT PAID . . . . . $ 880.60

RATE AND CHARGES ON GOVERNMENT'S BASIS:

Actual or Minimum Weight 14,400 Rate: 3.48 $ 501.12 $ _____

_____ $ _____
(Other)

TOTAL CHARGES . . . . . $ 501.12

OVERPAYMENT . . . . . $ 379.48

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

Central & Southern Motor Freight Tariff Assn. #100A MF-I.C.C. 140, Supp. 63, Supp. 83
National Motor Freight Classification #A 4, ~~64~~ Item 60280, Class 85 Less truckload

T-345 (Rev. 10/14/60)

(See Over)

BASIS FOR CARRIER'S CHARGES: (On information or belief)

Actual or Minimum Weight: * See below Rate: **See below
~~**~~See below

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

* 5400 lbs. as 22000lbs ** @ $1.85
5400 lbs. as 22000lbs @ $1.85
excess 3600 lbs. @ $1.85

*** Central and Southern Motor Freight Tariff Association 100A MF-ICC 140 ~~National Motor Freight Classification~~ (Item 4550-capacity rule and exception to minimum weight). ~~and~~ Item 60280 , 85-45-24000 , National Motor Freight Classification A-4

UNCOLLECTED OVERCHARGES:

Paid $_____ S/Bs $_____ O/C $_____

Actual or Minimum Weight: _____ Rate _____

Authority: (Use unabbreviated classification, tariff, and quotation references including agents' names and Interstate Commerce Commission numbers.)

(The following supplemental statement was later submitted for the record by Mr. Cimokowski:)

STATEMENT OF EDWIN W. CIMOKOWSKI, ASSISTANT GENERAL COUNSEL, GENERAL ACCOUNTING OFFICE, SUPPLEMENTAL TO THAT MADE BEFORE THE SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS OF THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE ON H.R. 5596

On June 14, 1961, during the course of testimony on H.R. 5596 some of the questions raised by the members of the subcommittee were directed particularly to the examples furnished as part of an appendix to our statement in support of the bill. H.R. 5596 would provide a basis of action by shippers against motor common carriers and freight forwarders to recover reparation for unreasonable rates and charges. As explained at the hearing, we are in favor of such proposed legislation. The examples, four in number, comprising the appendix to our statement recommending favorable consideration of the bill, are representative of several thousand items on which a record was maintained to obtain a reasonably accurate idea as to the damages which the Government might have been able to establish, on the basis of principles enunciated by the Interstate Commerce Commission in cases involving facts believed to be comparable to those in the examples submitted to the subcommittee.

A particular example occasioning a series of questions is identified in category 3 under the caption "Commodity or exceptions rates higher than class rates." In that example a shipment of 12,260 pounds of setup aluminum tanks was transported from Mira Loma, Calif., to Walker Air Force Base, N. Mex., during June 1958. For this transportation service the motor carrier charged and collected $1,971.41 on the basis of a rate of $16.08 per 100 pounds as determined by use of an exceptions rating of three times first class published in the applicable tariff.

In our examination of the paid charges we found that the national motor freight classification rating of second class produced a rate of $5.20 per 100 pounds, which, when applied to the actual weight of 12,260 pounds, resulted in charges of $637.52. The difference (being a prima facie measure of the unreasonable charges) of $1,333.89 between the applicable exceptions basis charges of $1,971.41 charged by and paid to the carrier and the classification basis charges of $637.52 (which are displaced by the exceptions basis charges) is not recoverable under the doctrine of the *T.I.M.E.* case, 359 U.S. 464, to the effect that recovery of unreasonable motor carrier charges is precluded in postshipment litigation.

Both rates, that is, the exceptions rating of three times first class on any quantity of freight, and the classification second class rating on a volume minimum weight of 12,000 pounds, are prescribed in tariff publications on file with the Interstate Commerce Commission. The national motor freight classification contains a rule to the effect that the establishment of an exceptions rating removes the application of the classification rating on the same article. Frequently, alternation of the classification and exceptions ratings, whichever results in the lower charges, is permitted by tariff provisions. In this instance there were no such tariff provisions authorizing alternation. Thus the shipper was required by law to pay and the carrier was required to collect charges computed on the basis of the $16.08 exceptions rating and rate.

As we indicated in the prefatory explanation to the tabulation of the example in category 3, the Interstate Commerce Commission has found in many cases that an exceptions rating which is higher than a classification rating on the same article is an abnormality to which a presumption of unreasonableness attaches in the absence of special circumstances justifying the higher exceptions rating. Many cases of a similar nature have been ruled upon by the Commission against the carriers.

Under part I of the Interstate Commerce Act the shipper in a case similar to the example discussed above could maintain an action against a railroad to recover the difference between the higher exceptions charge basis and the lower classification charge basis, the latter basis presumptively being the lawful (reasonable) maximum basis, as distinguished from the legal (duly published and filed tariff required by the act to be applied in the first instance) basis collectible by the carrier. Under part II of the act, however, a shipper has no equivalent right to maintain an action since the *T.I.M.E.* case rule is that reparation is not authorized under part II.

Some members of the subcommittee asked if the shipper in the example involving the aluminum tanks could find out what the applicable charges were before shipment was made. Question was raised also as to whether or not the shipper would have a right to bargain with a carrier for the rate to be charged or to "shop around" and see if there are other modes of transportation that are cheaper.

It is true that the shipper in this instance could have found out what the charges were going to be before he shipped. The rate which the carrier would have quoted would be the $16.08 rate since this was the legal (that is, by the terms of the duly published and filed tariff under which the carrier operated the only rate which under the law could be charged for the transportation in the absence of a sec. 22 arrangement) rate and the shipper could at that time do no more than verify the legal basis. While to an experienced traffic manager the obviously high rate would suggest evidence of unreasonableness, it is reasonable to assume that a shipping officer, not having the facilities, materials, personnel, or time to research the matter adequately to determine what a reasonable basis might be, usually would make no objection to the rate being applied. As a matter of fact, most of the responsibility and the means for analyzing and making determinations concerning cost data and tariff provisions affecting Department of Defense surface traffic in the United States is placed in the Military Traffic Management Agency in the Department of Defense, where tariff files and data and information on an extensive scale are maintained.

Unless a shipping officer is able to command a relatively quick analysis of the rate situation concerning the large variety and different characteristics of the articles shipped from the installation at which he is stationed, it is not very likely that he will be able, at least not in the earlier stages of a program covering the shipment of certain articles, to set in motion the machinery for rate negotiations and reductions. Adjustments in rate bases, insofar as the Government is concerned, might be accomplished by special arrangements authorized under section 22 of the Interstate Commerce Act, once anomalous or discrepant transportation charge situations come to the notice of the shipping officer. However, most rate adjustments for all shippers, the Government included, are effected through the usual practices and procedures prevailing in the industry generally.

Under sections 6 and 217 (49 U.S.C. 6 and 317) of the act, rail and motor carriers are required to file tariffs containing the rates and charges applicable to the services furnished by them. These are the legal rates and charges. The carriers are prohibited under penalties provided elsewhere in the act from charging higher, lower, or different rates and charges. One example of un-

lawful rates and charges is the situation where carriers might collect charges different from those in their published and filed tariffs because such an action plainly is in violation of sections 6 and 217 of the act. Any tariff changes that are contemplated by the carriers, whether as a result of independent and voluntary action on their part, or whether instigated by a shipper or a group of shippers, must adhere to the same procedure. The law requires that the carriers give 30 days' notice of tariff changes before they become effective, unless the Commission specially authorizes a shorter period of notice; sometimes as little as 1 day's notice is authorized.

The normal process of revising applicable published tariff rates is often a time-consuming one. For instance, it may develop that a particular manufacturer represents to a carrier or a group of carriers serving his plant that, based on his analysis of carrier costs and his own competitive position, he is entitled to a rate lower than that currently effective for the transportation of his products. The manufacturer's proposal may then go to the carriers' tariff bureau, conference, or association where it is made the subject of consideration by a committee having a broad perspective of costs and comparable transportation conditions. Assuming that the manufacturer's proposal is acted upon favorably by the committee, the tariff publishing agent for the particular conference or association would incorporate the reduced basis in a tariff supplement or amendment, copies of which must be filed with the Interstate Commerce Commission.

The handling thus far may have taken a few months but the shipper still may not have achieved his objective. The proposed rate contained in the supplement to become effective 30 days after issuance might then be made the subject of suspension on the Commission's own motion or on the protest of other interested carriers who possibly might feel that the reduced rate is capable of producing adverse economic effects insofar as their own operations are concerned. The period of suspension under the law can last as long as 7 months. After that, as it often happens, the suspension may be continued voluntarily by the tariff agent or carriers who originally were interested in providing the reduced rate for the manufacturer which they served. Eventually, the reduced rate may be permitted to become effective and it then becomes legally applicable for the account of the carrier or carriers involved. In the interim, the shipper must move his goods at the prevailing rate and the subsequent publication of a lower rate does him no good on his past shipments.

Ordinarily a shipping officer does not have an opportunity to "shop around" for one of several alternative transportation price bases. In the case of many military installations and other points of origin and destination, service might be provided by only one mode of carrier. Where two modes of common carriage such as rail and motor are available at a particular shipping point the prices for the respective services often are closely comparable and there is not much choice from the viewpoint of price. Where charges are the same, a Government shipping officer is by departmental regulations required to apportion the available traffic so that an equitable distribution may be maintained. Where the price via one carrier is lower than that via another, a Government shipping officer, assuming that service factors are equal, is required to select the lower cost carrier for his needs.

In the particular example concerning the aluminum tanks transported from Mira Loma to the Walker Air Force Base, the shipping officer's selection of carriers might have been circumscribed by the need for expedition or other reasons. It could be assumed that the shipping officer chose a motor carrier as providing a service from loading dock at point of origin to unloading dock at point of destination which may not have been available by rail. The shipping officer presumably had no opportunity to "shop around" for lower rates under section 22 or otherwise. Normally, he would not be in a position to evaluate the transportation costs to the point of determining that the $16.08 rate was far in excess of what might have been found to be the lawful maximum basis in an appropriate proceeding. While the use of section 22 quotations is not uncommon, such quotations generally are not tendered on a single shipment basis but often evolve as a result of some extended negotiations between the carriers and the Government. In other words, the consummation of negotiations sometimes takes weeks. A reduced charge basis tendered by motor carriers would not be a matter of quick bargaining since the carriers' agents take time to consult with responsible carrier officials.

Thus a Government shipping officer is not in a position promptly to obtain by section 22 quotation a reasonable rate or charge basis consistent with standards about which he would have limited knowledge. The practical consequences or incidents of his capacity or position are that his choice of carrier would be dictated, first, by the exigencise of the particular shipment and, second, by the mode and carrier which on the face of the tariff publications covering carriers' services and rates available to him or about which he is advised is the lowest price carrier. It is not until later, at the places where the tariff and rate research machinery of Government or other shipping organizations are centralized, that a more penetrating inquiry might find that the legally applicable rates charged are unlawful in some respects.

In the case of the Government, the primary concern with unlawfulness of rates as compared with their legality may be concentrated on tariff published rates appearing to be in violation of sections 1(5) and 216(d) and section 4, part I of the act, relating to unreasonable rates, and intermediate and aggregate of intermediate rates respectively. Rates which are shown to be in violation of those provisions produce unlawful consequences and may be properly characterized as "unlawful," notwithstanding they are legal to the extent that they comply with the tariff filing and adherence provisions of section 6 or section 217 of the act. Therein may be the simplest explanation of legal versus lawful. If a common carrier rate is properly filed with the Interstate Commmerce Commission and permitted to become effective, it becomes the legal rate, being one which the law requires the carriers and the shipping public to observe strictly in accordance with the terms of the tariff. But, as indicated, what is a legal rate might not be a lawful rate in that while it is consistent with section 6 or section 217 of the act, it may contravene the provisions of other sections of the act and entail the penalties and remedies therein provided for the correction of proven irregularities or injustices.

We trust that the foregoing supplemental statement may serve to clarify some of the points brought out during the course of the questioning following our principal statement.

Mr. STAGGERS. We will next hear from Mr. Mark L. Keith, manager, Traffic Services, the Farm Bureau Cooperative Association, Inc.

STATEMENT OF MARK L. KEITH, MANAGER, TRAFFIC SERVICES FOR THE FARM BUREAU COOPERATIVE ASSOCIATION, INC., COLUMBUS, OHIO

Mr. STAGGERS. All right. Mr. Keith, will you begin?

Mr. KEITH. Mr. Chairman and members of the subcommittee, my name is Mark L. Keith. I am manager, traffic services for the Farm Bureau Cooperative Association, Inc., at Columbus, Ohio. Our association is a member of the National Council of Farmer Cooperatives, and I am testifying today on behalf of the council as chairman of its transportation committee.

The membership of the National Council of Farm Cooperatives is comprised entirely of farmers' cooperative business organizations engaged in the marketing of agricultural commodities or the purchasing of farm production supplies or farm business services, or both.

Since many of the council's members are national, regional, or statewide federated cooperatives composed of numerous county and local associations, the council actually represents approximately half of the near 10,000 agricultural cooperatives in the country, serving about 2.75 million farmer memberships.

In order to accomplish the immense movement of agricultural commodities and farm production supplies, farmers' cooperative business organizations use all modes of transportation—rail, motor truck, water, pipelines, and air. Included in the annual transportation bill

of these organizations are millions of dollars paid out for the freight hauling services performed by motor freight trucking companies.

Although the interstate movement of agricultural commodities by for-hire motor carriers is exempt from economic regulation under section 203(b)(6) of the Motor Carrier Act, I would point out that there is a substantial volume of products marketed by farmer cooperatives and supplies purchased by them for their members that move under published tariff rates by certificated common carriers. Illustrative of such products and supplies are frozen fruits and vegetables, canned goods, fruit and vegetable juices including concentrates, fertilizer, petroleum products, farm machinery and equipment, feed and many feed ingredients, insecticides, containers, and a wide variety of other supplies.

As users of rail and water transportation, our members have the right under parts I and III of the Interstate Commerce Act to seek an award of reparation to recover unlawful charges collected by these two types of carriers. This same right of recovery does not exist under parts II and IV of the Interstate Commerce Act where motor carriers and freight forwarders are concerned.

The national council believes that the shippers and receivers of freight should have a legal right to recover damages resulting from unreasonable or otherwise unlawful rates charged by motor carriers and freight forwarders. For this reason, the following policy resolution was adopted by the official delegates of its member organizations at the council's 1960 annual meeting.

Shipper Reparations

The national council shall support legislation to incorporate into parts II and IV of the Interstate Commerce Act, legislation to authorize awards of reparation to shippers equally as fair as those contained in parts I and III of the act.

On May 18, 1959, the Supreme Court handed down its decision in the *Davidson—T.I.M.E.* cases. The Court held that under the statute, shippers are without legal means to recover damages suffered as a result of unlawful charges for transportation provided by motor carriers and freight forwarders.

Although shippers have had no recourse under the Interstate Commerce Act, they could up until the time of the Davidson—T.I.M.E. decision go into court and secure an award of damages.

The Supreme Court's decision now leaves the shipper without recourse against motor carriers and freight forwarders who have charged unlawful rates.

The National Council of Farmer Cooperatives supports H.R. 5596 as being the type of legislation needed to fill the gap in the law today pointed up by the Supreme Court decision previously referred to. The enactment of this bill would extend the reparations procedures to parts II and IV of the act. Users of transportation would then have a legal means by which they can recover unlawful freight charges made by any of the four classes of carriers who are under the jurisdiction of the Interstate Commerce Act.

We do not pose as experts on the technical details of the proposed bill. If in the course of these hearings it should be demonstrated that some changes should be made in the bill to improve and strengthen it without impairing its basic purpose and objective, we would of course

be favorable to any such changes that the committee might in its good judgment determine should be made.

We appreciate the opportunity of presenting the council's policy position to your committee and we respectfully urge your favorable action on H.R. 5596.

Mr. Chairman, this concludes my remarks.

Mr. STAGGERS. At this time, I will defer to Mr. Devine.

I understand you are from his district.

Mr. Devine?

Mr. DEVINE. Mr. Keith, I would like to welcome you to Washington representing the National Farm Bureau Cooperative Association. We appreciate your appearing before this committee.

Mr. STAGGERS. Thank you.

Any further questions?

If not, we wish to thank you, Mr. Keith. We think you have stated your case very briefly and concisely. I don't see any need for further questions.

We go in session in 5 minutes, so I expect at this time we will adjourn until tomorrow at 10 o'clock. I don't think it is feasible that we can meet this afternoon because of the proposition that we have on the floor, which would involve a vote, I am sure.

So we stand adjourned until tomorrow at 10 o'clock in this room.

(Whereupon, at 11:55 a.m., the committee recessed, to reconvene at 10 a.m., Thursday, June 15, 1961.)

AMENDING PARTS II AND IV OF INTERSTATE COMMERCE ACT RE REPARATIONS

THURSDAY, JUNE 15, 1961

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS OF THE
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10 a.m., in room 1301, New House Office Building, Hon. Harley O. Staggers presiding.

Present: Representatives Staggers (presiding), Friedel, Jarman, Collier, and Devine.

Mr. STAGGERS. The committee will come to order.

We will resume the hearings on H.R. 5596 on which we were hearing testimony when the committee adjourned. And the first witness this morning will be Mr. Charles Myers, counsel of the National Industrial Traffic League.

Mr. Myers?

STATEMENT OF CHARLES MYERS, COUNSEL, THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Mr. MYERS. My name is Charles B. Myers, of Chicago, Ill.; I am a member of the bar of Illinois and a practitioner devoting special attention to matters before the Interstate Commerce Commission. I am appearing as counsel for the National Industrial Traffic League to state the position of the league favoring this bill, and to develop the features of the regulatory process and the current circumstances which give rise to urgent need for prompt enactment.

The National Industrial Traffic League is a nationwide organization of shippers. Its membership is drawn from all parts of the United States and includes every line of industrial and commercial activity and shippers using all forms of transport by rail, water, and motor. Its membership includes numerous chambers of commerce, boards of trade, and similar commercial organizations also having a substantial interest in transportation matters and representing, in turn, important segments of the shipping public through their own memberships.

The bill, H.R. 5596, is one of several pending bills designed to correct an unfair situation which adversely affects the interest of the shipping public. Under parts I and III of the Interstate Commerce Act, a shipper who is injured by a violation of the act by a railroad or a water carrier, has a remedy at law and can obtain damges or reparation where justified. There are no comparable provisions in parts II and IV of the act governing motor carriers and freight forwarders, and the Supreme Court in *T.I.M.E.* v. *United States* (359

U.S. 464, 3 L. ed. 2d 952 (1959)), has recently held that the law precludes any reparation for damage arising out of the past application of unreasonable rates. The effect of that decision was to leave shippers without any remedy in law for a violation of the act by a motor carrier.

At the same time, the rapid growth and increasing dominant position of motor carriers and freight forwarders in the transportation industry has given rise to a greater need than has heretofore existed for protection of shippers against violations of the act. There is, therefore, much interest and concern on the part of individual shippers for remedial legislation which is felt to be already long overdue.

What the shipping public needs and desires is the enactment of provisions with respect to motor carriers and freight forwards similar to those which have long existed with respect to railroads and water carriers. Such provisions are well drafted in H.R. 5596 and would simply put into effect measures which the original framers of the Motor Carrier Act envisaged as a probable future necessity.

The motor carrier and freight forwarding industry have now come of age and should be made responsible in the same way as the railroads and water carriers.

The statutory scheme of regulation requires that the rates and practices of all types of carriers shall be just as reasonable and nondiscriminatory. Common carriers are required to publish and file their charges and are forbidden to charge or collect any rate other than that provided in the applicable tariff.

Railroads, which have been subject to regulation since the beginning of the Interstate Commerce Act in 1887, are liable in damages to any person injured by a violation of the act, including the charging of unreasonable or otherwise unlawful rates.

Motor carriers, however, were first subject to regulation in 1935 and freight forwarders in 1942, and no provisions for civil liability were included in the amendments on those occasions even though the carriers were forbidden to charge unreasonable rates. The reasons for the difference are illuminating because they rest upon a situation which has changed completely.

The Motor Carrier Act of 1935 was drafted by the late Commissioner Joseph B. Eastman, who had by then served on the Commission or as coordinator of transportation for 17 years.

In the 1940 hearings, Commissioner Eastman explained that reparation provisions were omitted from the Motor Carrier Act only because of a desire to lighten the burdens of the motor carriers in the early stages of regulation and in the absence of any strong indication of public need. The initial motor carrier tariffs, he said, were imperfect products and experienced traffic experts could make a business out of reparation where tariffs were poorly worded and before improvements could be made.

Mr. Eastman said that in the first 5 years of regulation, the Commission had not once had occasion to condemn motor carrier rates as unreasonably high, that motor carriers had practically no traffic which was noncompetitive and there had been no indication of need on the part of the shippers for provisions enabling the Commission to award reparation for damages suffered because of unreasonable charges, and that transpired in the Senate hearings referred to in footnote 1.

(Footnote 1 is as follows:)

1. Hearings Senate Committee on Interstate and Foreign Commerce on S. 1310, 2016, 1869, 2009, 76th Cong. 1st sess., pp. 756–757, 762, 785, 792.

Mr. MYERS. At the same time, it was early recognized that a time would come when reparation provisions would have to be put into part II. Commissioner Eastman, in a letter dated January 29, 1940, and addressed to the chairman of the Senate Committee on Interstate Commerce, wrote on the subject of reparation against motor carriers.

Part II does not now impose such a liability on motor carriers, and while we think it probable that ultimately such a liability should be imposed, the Commission has not heretofore been disposed to recommend this until conditions in the motor-carrier industry have been more nearly worked out.

By 1945, conditions had already changed to the point where the Commission again addressed the Congress by letter dated April 3, 1945, from the chairman of its legislative committee, Commissioner Walter M. W. Splawn to Senator Burton K. Wheeler, saying that, "We believe that the time has arrived when this liability may properly be imposed."

In the meantime, this league had also reached the conclusion that remedies must be provided for shippers injured by unreasonable motor carrier charges.

In 1943, the league's motor carrier rate and classification committee reported extensively on the subject and recommended that the league seek legislative changes providing reparations provisions in part II substantially similar to those already contained in part I of the Interstate Commerce Act. This recommendation was adopted by the entire membership at the 1943 annual meeting and has subsequently been reaffirmed and implemented.

In 1948, the league appeared in Congress supporting S. 1194 and H.R. 2759.

Again in 1957, the league appeared in support of S. 378 in the 1st session of the 85th Congress.

Until the decision in the *TIME* case, however, the need for remedial legislation did not become acute. From the time when the need was first felt in 1943 until that decision in 1959, shippers were not wholly without a remedy. In a series of cases beginning with *W. A. Barrows Porcelain Enamel Company* v. *Cushman M. Delivery* (11 M.C.C. 365 (1939)), and culminating in *Bell Potato Chip Co.* v. *Aberdeen Truck Line* (43 M.C.C. 337 (1944)), and *Victory Granite Co.* v. *Central Truck Lines, Inc.* (44 M.C.C. 320 (1945)), it was held by the Commission and recognized by the courts that the shipping public enjoyed a common law right of action in court, which was subject only to the primary jurisdiction of the Interstate Commerce Commission to determine administrative questions such as issues as to the reasonableness of rates.

The cases supporting that Commission decision are stated in footnote 2.

(Footnote 2 is as follows:)

2. See, *Texas & Pacific R.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 51 L. Ed. 583; *Greater Northern R.* v. *Merchants Elevator*, 259 U.S. 285, 66 L. Ed. 943; *General American Tank Car Corp.* v. *El Dorado*, 308 U.S. 422; 84 L. Ed. 361; *U.S.* v. *Western Pacific*, 352 U.S. 59, 1 L. Ed. 2d 126 (1956).

Mr. MYERS. Under the so-called *Bell Potato Chip* doctrine, a shipper injured by having paid unreasonably high rates could recover the difference between the rates paid and a reasonable rate by bringing action in court, upon which the court would refer the question of reasonableness to the Interstate Commerce Commission for a determination. Upon requisite findings by the Commission, recovery in court could be had.

During the lifetime of the *Bell Potato Chip* doctrine, shipper advocacy for reparation provisions in part II was largely based upon a desire for a less cumbersome procedure that did not involve the necessity of bringing cases both in court and before the Commission.

Also, there was need for uniformity in the statute of limitations which was then governed by varying State laws, there being no provision in part II of the Interstate Commerce Act. Under the *Bell Potato Chip* doctrine, actions could be brought against motor carriers in State courts pursuant to statute of limitations varying all the way from 1 to 10 years. Uniformity was desired in all quarters.

In 1959, the Supreme Court decision in the *TIME* case overturned the *Bell Potato Chip* doctrine and wiped out the only remedy available to the shipping public for past exaction of unreasonable charges by motor carriers or freight forwarders. This happened at a time when the need for relief had greatly increased.

Whereas in the early days of regulation Commissioner Eastman could say that the Commission had received no complaints against a motor carrier rate as being too high, the same cannot be said today and many shippers are suffering, or in danger of suffering, irreparable injuries for lack of a fair remedy.

One current and glaring example is a $3 charge which many motor carriers are imposing every time they issue an order bill of lading. Until recently, no common carrier ever made any charge for issuing such bills of lading. On several occasions in the last 2 or 3 years when such charges were attempted, the Commission investigated and consistently found them to be not justified.

In each case the charges were required to be canceled, both by motor carriers and by railroads. Nevertheless, certain motor carrier tariff bureaus again published such charges last year.

The Commission promptly suspended the charges for investigation; however, the initial publications were followed by scores of other publications by numerous carriers and tariff bureaus throughout the country until more than 40 different tariffs have been filed.

Many of these tariffs were obscure and escaped immediate notice so that they were not protected or suspended and went into effect, with the result that the shippers are now compelled to pay the charge.

In addition, the motor carriers made numerous requests for postponement of the hearing in the investigation proceeding and so stalled the proceeding that all the rest of the tariffs went into effect before briefs were filed with the Commission.

The case is now awaiting decision in terminal charges on order bills of lading shipments, docket No. 33518.

Under the present state of the law, if the Commission finds these charges to be unlawful, as it has done with every similar charge in the past, there will be no remedy for those innumerable shippers, large and small, who have been paying the unlawful charge.

In the early days of the Motor Carrier Act, the motor carriers patterned tariffs after the rate structure of the railroads, generally observing the railroad rates as a ceiling. Railroad transportation was the dominant mode and motor carrier traffic was almost entirely competitive.

In the 25 years since that time, industry has been largely geared to highway transportation for important segments of traffic, particularly in the small shipments field.

During the period from 1939 to 1959, the tonnage of less carload traffic originated by the railroads in eastern territory actually declined from more than 7 million tons to about 1.5 million tons, although the total amount of traffic increased greatly. In this traffic the motor carriers and freight forwarders have become dominant and there are many motor carrier and freight forwarder rates higher than rail rates. In this situation, complaints against unreasonably high rates are becoming more and more frequent and the need for a remedy in case of exorbitant charges is acute.

Within the past 24 months there has been a series of motor carrier rate increases, surcharges, and constant charge plans which were objected to by shippers as excessive and extortionate. There is an adequate remedy with respect to the rates and charges for the future in the Commission's jurisdiction to investigate and prescribe reasonable rates. But when the Commission finds that the rates charged in the past were unreasonable the shippers now have no relief.

It has been suggested that the shipping public is protected by the Commission's power under section 216(g) of the Interstate Commerce Act to prevent an increased charge from taking effect pending investigation. Such protection is wholly inadequate, however, when the investigation exceeds the maximum period of 7 months allowed for suspension or when the tariffs are so numerous and obscure that some of them escape immediate notice and suspension. In this connection, the Commission's power with respect to railroads under section 15(7) permits it to require the carriers to keep account of the amounts received in case of increased rates and to refund any part subsequently found not justified. Under section 216(g), the rates take effect at the end of the 7 months' suspension period with no possibility of refund.

Many unjust situations arise where suspension could not protect. Often it is discovered years after a shipment moved that the legally applicable tariff rate was higher than the rate paid. The carrier is then bound by law to collect the undercharge. In such a case, if the legal rate was unreasonably high, the shipper can plead that defense to a railroad claim, but not to a motor carrier.

The terms of the proposed bill H.R. 5596 are fair and equitable. It requires that all complaints must be filed within 2 years from the time the cause of action accrues. Motor carrier spokesmen say that the accounting problems would be insurmountable, but the fact is that the present law allows action for the recovery of overcharges (amounts charged in excess of the tariff) to be filed within 3 years; also, the carriers are allowed 3 years to bring actions to recover undercharges. The accounting is no different in connection with overcharges and undercharges than it is with respect of other adjustments.

We understand that some motor carriers are warning of the magni-

tude of the regulatory burden because of the very large number of truckers. But if the regulatory burden is increased it simply reflects the functioning of administrative machinery to right wrongs which are now without redress. The shipper should have his day in court.

A few actual examples may serve to illustrate other types of situations in which shippers can now be mulcted for extortionate charges without any opportunity for redress. A shipment of 21,800 pounds of building granite was sent from Sauk Rapids, Minn., to Tampa, Fla., on which the motor carrier collected charges of $708.50 on the basis of a rate of $3.25. Upon complaint to the Interstate Commerce Commission, it was found that the rate charged was unreasonable to the extent that it exceeded $2.40. Under the present state of the law, the prescribed rate would apply for the future but the shipper would be unable to collect the $167.86 excess charged on the past shipment.

In another case, a shipment of dressed poultry weighing 26,733 pounds was made from Marionville, Mo., to Chicago. The rate charged was $1.29, resulting in transportation charges of $344.86. Marionville, however, is located on U.S. 60 directly between Neosho, Mo., and Chicago, and a rate of 48 cents was maintained by the carrier from Neosho, to Chicago. At the 48-cent rate the charges would have been $128.32. Although Neosho was 47 miles farther from Chicago than Marionville and the carrier had to pass through Marionville on its way from Neosho to Chicago, it nevertheless charged the Marionville shipper $216.54 more than it would have charged a Neosho shipper for the same quality and character of traffic.

The Commission has long held that to receive greater compensation for transportation for a shorter distance than for a longer distance was prima facie unreasonable. Here again, even though the Commission should find that too much had been paid and that the lower rate was a maximum reasonable rate for the future, it could not give the shipper any reparation or relief for past shipments.

The National Industrial Traffic League, speaking for shippers generally, believes that it is only right that they should have some remedy when they are injured by any act of a motor carrier or freight forwarder which is contrary to law. While it may have been true 25 years ago that there was little need for such protection and the carriers were in a formative stage, that situation is not the case today. The motor carrier industry has come of age and ought to be required to assume responsibility commensurate with its place in the transportation system of the country.

Mr. FRIEDEL (presiding). Are there any questions?

Mr. COLLIER. Yes.

Mr. Myers, is there broad evidence of violations of rate regulations in the Chicago area?

Mr. MYERS. Violations of rate regulations, sir?

Mr. COLLIER. Yes. In other words, is there evidence of abuses that we are attempting to cure or remedy in this legislation?

Mr. MYERS. I am afraid I can't answer you specifically. I am a little bit confused by your inquiry with respect to rate violations.

Mr. COLLIER. Well, we are discussing legislation that proposes to provide a remedy to cure unreasonable rate charges.

Mr. MYERS. Yes, sir.

Mr. COLLIER. And I am simply asking, sir, if there is evidence in the Chicago area that there are abuses to the degree that this legislation is necessary.

Mr. MYERS. I can't say specifically with respect to Chicago. I do say that there is evidence of abuses with respect particularly to small shipment traffic. And over the very recent past that is becoming more prevalent.

Mr. COLLIER. I don't want this line of questioning to be construed as any opposition to the legislation; but to pursue that further, in your final paragraph of your statement you say, while it may have been true that 25 years ago there was little need for such protection, et cetera, actually isn't the freight handling business—and I know this to be a fact in Chicago—one of the most competitive industries that there is? Consequently, where there is steep competition such as there apparently is here, the probability of unreasonable rates are reduced by the very nature of competition.

Mr. MYERS. Well, sir, my impression of the keen competition in the Chicago area, I believe, is largely to the Chicago commercial zone itself, I mean an area embracing Gary, Chicago, and Hammond in Indiana, as well as a substantial portion of the city and the surrounding suburbs which is now free from regulation, and also traffic within the city itself and its confines, which would be intrastate traffic.

Now I believe that there is not keen competition in rates within the Chicago area on interstate traffic by motor carriers.

Now there is keen competition to secure the business. But those carriers largely have the same rates, almost without exception, the rates are made by a bureau, and as they are authorized to do, they get together and collectively set the rates.

Mr. COLLIER. Can you see anywhere in this legislation a recourse through the means provided in this measure against the type of trucking firm that is sort of a lease operation which you know is becoming more and more prevalent in the larger cities, and particularly in Chicago?

Mr. MYERS. By lease operation, do you mean the authorized motor carrier who rents his equipment from an affiliated company or someone else?

Mr. COLLIER. That is right, sir.

Mr. MYERS. Does not own the equipment?

Mr. COLLIER. For an extended period of time, or so many trailers for 3 days usage, where it is used, exclusively, by the shipper, for that period of time?

Mr. MYERS. Well, I think that type of arrangement would embrace a contract carrier which this legislation would not touch. This is confined to common carriers. And contract carriers do not have to serve the public generally, and they can well afford—and their shippers can well afford to dicker with them.

Now if your question relates to carriers who leased their equipment from others rather than to others, I would say that the act doesn't distinguish, and they are still common carriers and subject to all the requirements of the act.

Mr. COLLIER. And these in your opinion would be entirely subject to the requirements of this law?

Mr. MYERS. Yes, sir.

Mr. COLLIER. Yesterday, in the course of interrogating the General Counsel for the GSA, the question arose as to what problems would develop in a court, in this instance the district court, which would have jurisdiction in establishing what is an unreasonable rate, what is a legal rate or a lawful rate. And late in the hearing, pursuant to a question by Mr. Devine, it was pointed out that if a damage suit were filed in the district court, the determination would be made on the basis of referring the facts of the case back to the ICC.

Is it your understanding that this legislation would provide that even if the case were filed in a district court for damages, that the decision would be predicated upon the decision of the ICC, where a means is provided for filing a complaint in the first place?

Mr. MYERS. No, sir. My understanding is—and I know it has been the practice with respect to rail and water carrier—that the shipper would have an administrative remedy, an economical one, a ready one with the Interstate Commerce Commission, which has the primary jurisdiction in the matter.

Then, if his rate was found to be unreasonable, those findings made by the Commission could be taken—and the carrier refused to pay—could be taken into a district court, and they would be prima facie evidence of the unreasonableness of the rate, and the shipper could recover.

Mr. COLLIER. Thank you very much.

Mr. FRIEDEL. Mr. Devine?

Mr. DEVINE. No questions.

Mr. FRIEDEL. I would just like to get one thing on the record. Do all the shippers have to file their tariff rates with the Interstate Commerce Commission?

Mr. MYERS. Do all the shippers have to file their rates?

Mr. FRIEDEL. I mean carriers, sir, motor carriers.

Mr. MYERS. All carriers which hold certificates or permits, that is, that are our franchised or licensed carriers. There are several exemptions in the law, such as the agricultural exemption, the transportation within a commercial zone, transfer operations within a terminal area, which do not require any rate filing.

Mr. FRIEDEL. The reason I ask this question, in this case that you cite about the shipment of dressed poultry, the rate charged was $1.29.

Mr. MYERS. Yes, sir.

Mr. FRIEDEL. And then later on you said even at a longer distance it would be only 48 cents.

Now, why wasn't that rate known to the shipper at that particular time?

Mr. MYERS. The rate was known.

Mr. FRIEDEL. It was known?

Mr. MYERS. Yes, sir; $1.29 was the applicable rate, that is the rate in the tariff, and it is the rate which the carrier had to charge and the shipper had to pay. But that rate was an unreasonable rate, it was unreasonably high. It was extortionate for the services rendered, and particularly in the light of the fact that the carrier was rendering a less service from Neosho for 48 cents.

So the $1.29 rate was in the tariff, it was applicable, there is no question about that.

Mr. FRIEDEL. Wasn't the 48 cents in the tariff, too?

Mr. MYERS. Yes, sir, but it did not apply for Marionville, it only applied for Neosho.

Mr. FRIEDEL. Which was further away?

Mr. MYERS. Yes.

Mr. FRIEDEL. That is all, Mr. Myers.

Mr. MYERS. Thank you, Mr. Chairman.

Mr. Chairman, with your permission, my colleague, Mr. Donley, chairman of the league's common carrier motor vehicle committee, has a brief and not repetitive statement which he would like to offer now.

Mr. FRIEDEL. You may proceed.

STATEMENT OF CHARLES M. DONLEY, CHAIRMAN, COMMON CARRIER MOTOR VEHICLE COMMITTEE, NATIONAL INDUSTRIAL TRAFFIC LEAGUE

Mr. DONLEY. Mr. Chairman, I will try to characterize the commercial facts of life relative to a bill from a shipper's standpoint.

My name is Charles M. Donley, I am general manager of Charles Donley & Associates, Pittsburgh, Pa. I have been associated since 1946 with this firm which was founded by my father 42 years ago. All my business years since 1941 have been devoted to various aspects of freight traffic management, transportation research, and consulting services in the field of movement of goods within continental United States and overseas.

I want to add that my firm serves some 400 large and small shippers and receivers of freight throughout the United States engaged in the manufacturing, merchandizing, mining and agricultural fields.

I am also chairman of the Common Carrier by Motor Vehicle Committee of the National Industrial Traffic League. The league as has been previously pointed out is a nationwide organization of shippers and receivers—the users of all modes of transportation. The Common Carrier by Motor Vehicle Committee is representative of all types, sizes, and categories of shippers and receivers of freight.

The committee, and the league representing by and large the shipping public, stand unequivocally in support of the bill before us today.

Theoretically, a shipper should be able to purchase transportation in the open market much the same as he purchases other services and supplies. Such is not the fact, however, To begin with, suppliers of transportation including motor carriers are by and large permitted under the law collectively to fix freight rates. These rates or charges, once they appear in tariffs having the force and effect of statutes, must be paid by shippers.

Even if motor carriers were entirely altruistic and objective in the fixing of their rates and charges, it would seem that there should still, as a matter of economic doctrine and law, be a remedy available to shippers who may be injured by unduly unreasonable or discriminatory charges. One key element underlying such doctrine is that operation of ordinary economic laws of competition, particularly within a given mode of transportation, is largely restrained. The possibility of exorbitant and unreasonable charges being assessed shippers is thus greatly enhanced. In spite of some safeguards avail-

able under the Interstate Commerce Act prior to the effective date of carrier charges, the many thousands of tariff rates and schedules filed at the Interstate Commerce Commission each day permit obvious opportunity for establishment and collection of what by all accepted administrative standards could, if tested, be declared unreasonable and exorbitant charges.

This means simply that unlike any other area of commercial life, shippers of freight via motor carrier must operate entirely at their own peril without resource or remedy against unlawful or unreasonable economic acts of their suppliers.

Not only is this abhorrent to the basic concept that there must be a remedy for every wrong, but it is fundamentally inconsistent in that the other two principal modes of transportation, railroads, and water carriers, are by the statute strictly liable for damages shippers may encounter at their hands in the form of unreasonable rates and charges.

In 1961, the motor carriers will transport a far greater number of shipments than will the railroads and water carries combined. The inconguity under a uniform regulatory policy of requiring two of the major modes of transportation to be responsible for damages to the shipping public, yet permitting other modes to be free of such liability, should be obvious.

The majority of shipments by number moves via motor carrier. Of these motor carrier shipments, a substantial majority moves under rates made collectively by organized motor carrier bureaus. Continuation of such pricing practices entirely free from any liability for damages sustained by shippers is clearly contrary to the public interest.

We would like to point out that when no fear of, nor responsibility for consequences of an unjust and unreasonable charge exist, there is actually no limit to the potential damage that can be thrust onto the public in this particular area. Thus, a reasonable and positive statutory safeguard fixing the responsibility for such acts must be established before further damage is done.

Lest there be misunderstanding, let me digress and characterize the dilemma facing the average shipper-member of the league:

No ordinary buyer is protected by a specific law against paying per se a high price for his purchases. "Let the buyer beware" is a practical economic concept as old as civilized man. But this doctrine assumes the buyer has a relatively free choice of suppliers and thus, at least theoretically, of prices. In fact, such free choice is assured in the United States, is it not, by the fabric of antitrust legislation, and manufacturers or suppliers who flout these precepts face the toils of the law.

But such free choice of supplier and price is not at all available to many league members who regularly purchase motor carrier transportation. This is particularly true of smaller shippers, manufacturers, and merchants who often lack economic bargaining strength with motor carriers because their shipments move in small lots.

Most prices on rates paid to motor carriers particularly by the small shippers last mentioned, are fixed collectively, by collective action by large groups of motor carriers—commonly known as motor carrier bureaus. These carriers acting as bureaus are immune from

the provisions of the antitrust laws. Thus, it has become a cold fact of life that these shippers whose numbers are legion literally have no free choice of suppliers of transportation, and when a choice is available, the prices are identical because of the pricing activities I have mentioned. Our experience has shown that the levels or forms of such prices can easily become unreasonable.

The all-important point here is that monopolistic pricing and total lack of responsibility for damages arising therefrom, form a deadly combination against which the shipping public should have a right to statutory protection.

In my experience, the Interstate Commerce Commission has used its statutory right under parts I and III of the act to award reparation most sparingly. Aggrieved shippers have been required to present unequivocal proof of damages in formal proceedings. The Congress need have no fear of runaway use of such statutory powers. In fact, I have not in my business experiences heard of any strong or probative objection to Commission awards of reparation against rail or water carriers.

In conclusion, I repeat that the shipping public should have a right to a reasonable remedy for every wrong. We have every reason to expect civil recourse against unreasonable and exorbitant motor carrier and freight forwarder charges just as we have this very same protection on shipments we make via rail and water carriers.

Now, digressing in conclusion, let me say that in my opinion this legislation is not intended, nor will it injure the motor carriers or freight forwarders. It will merely tend to make them more responsible.

Thank you.

Mr. FRIEDEL. Any questions, Mr. Jarman?

Mr. JARMAN. No questions.

Mr. FRIEDEL. Mr. Devine?

Mr. DEVINE. No questions.

Mr. FRIEDEL. Mr. Collier?

Mr. COLLIER. No questions.

Mr. FRIEDEL. The next witness to be heard will be Mr. Angus McDonald, assistant director, Legislative Service Division of the National Farmers Union.

He left a statement to be filed. Without objection, the statement will be filed.

(The statement follows:)

STATEMENT OF ANGUS MCDONALD, ASSISTANT DIRECTOR, LEGISLATIVE SERVICES DIVISION OF THE NATIONAL FARMERS UNION IN SUPPORT OF H.R. 5596

Mr. Chairman and members of the committee, I appear here in support of H.R. 5596, a bill which would correct certain inequities in the Interstate Commerce Act in regard to refunds of unlawful charges on shipments.

Our members have an indirect and direct interest in this legislation. National Farmers Union is an organization of growers, accounting for a large part of grain and other products produced and marketed in the Mississippi and Missouri River Valleys.

The Farmers Union Grain Terminal Association, reputed to be the largest grain marketing cooperative in the world, markets between 175 and 250 million bushels of grain a year. The Farmers Union Central Exchange, also located in the Midwest, a farm supply cooperative, furnishes a substantial portion of implements, supplies, household items, and other consumer goods which are purchased by the some 175,000 members of the cooperative.

Specifically in regard to this legislation, we wish to associate ourselves with a statement entered in the record in support of the bill by the National Council of Farmer Cooperatives.

We urge speedy approval of the measure to correct the existing inequity.

Mr. FRIEDEL. Mr. Gerold E. Franzen, director, Transportation Division, Chicago Association of Commerce and Industry.

STATEMENT OF GERALD E. FRANZEN, DIRECTOR, TRANSPORTATION DIVISION, CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY

Mr. FRANZEN. My name is Gerald E. Franzen. My address is 30 West Monroe Street, Chicago, Ill. I am director of the Transportation Division of the Chicago Association of Commerce and Industry and appear here today on behalf of that organization in support of H.R. 5596.

The Chicago Association of Commerce and Industry is a voluntary organization of individuals, firms, and corporations, organized and existing under the laws of the State of Illinois. It has approximately 6,400 members. While the name of our organization is the Chicago Association of Commerce and Industry it functions as the chamber of commerce for the Chicago metropolitan area.

I am not going to read my prepared statement because much of the material has been covered by two of the witnesses that have been heard this morning. However, there is one item I would like to call to your attention, and that is the paragraph on page 3, where I refer to the commonly known Doyle Report on National Transportation Policy. I call attention to part IV of that document, which deals with the organization of transportation law, wherein chapter 2 of that part points up some of the inconsistencies noted in the statutes regulating transportation. In the section entitled 146, entitled "Reparations and Penalties," the report says, in referring to reparations:

There is no doubt that such a provision can be an effective deterrent against excessive rates.

The special study group raised the question as to why this reparation provision should not apply to all common carriers and possibly to all carriers for hire. The report continues that if this provision has no effect, it should not apply to the railroads, and that it is difficult to reconcile with the declared national policy of the Congress—

to provide for fair and impartial regulation of all modes of transportation.

Mr. Chairman, I would appreciate having my complete statement entered as part of the record of this hearing, and in concluding, urge that H.R. 5596 be reported favorably in order to avoid the present discrimination and undue burden that is placed upon shippers and provide for the necessary equality of regulation with respect to the transportation services by all forms of transportation.

I might add that I am a member of the National Industrial Traffic League, and while I did not have the opportunity to get together with Mr. Myers before the preparation of his statement, he has very completely brought out the history and important information on this subject, and I concur with his statement as well as that which was read by Mr. Donley.

Mr. FRIEDEL. Mr. Franzen, your full statement will be incorporated.

(The statement referred to follows:)

TESTIMONY OF GERALD E. FRANZEN, DIRECTOR, TRANSPORTATION DIVISION, CHICAGO ASSOCIATION OF COMMERCE AND INDUSTRY

My name is Gerald E. Franzen. My address is 30 West Monroe Street, Chicago, Ill. I am director of the Transportation Division of the Chicago Association of Commerce and Industry and appear here today on behalf of that organization in support of H.R. 5596.

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The association works to promote the business of the Chicago metropolitan area and of its members in many ways including improvement of transportation services and rates as well as the laws and rules and regulations relating to all modes of transportation.

The Interstate Commerce Act presently provides that when a railroad or carrier by water charges an excessive or unreasonable rate a shipper may complain to the Interstate Commerce Commission and upon proof be awarded damages or "reparations" on past shipments.

Similar specific provisions were not included in part II and part IV of the act which apply to motor carriers and freight forwarders. However, part II and part IV of the act prohibit motor carriers and freight forwarders from charging excessive or unreasonable rates. H.R. 5596 would amend the Interstate Commerce Act to permit the Interstate Commerce Commission to award damages or "reparations" on motor carrier and freight forwarder shipments.

Since the enactment of the Motor Carrier Act of 1935 and the Freight Forwarder Act in 1942 there have been numerous bills introduced in Congress providing for amendment to the act so that the Interstate Commerce Commission could award reparation on shipments moving via motor carriers and freight forwarders in a manner similar to that provided in connection with rail and water carrier shipments.

The Interstate Commerce Commission in its 74th annual report recommends amendment of sections 204a and 406a to permit reparation awards. Quoted below is the section of the report covering this subject:

"We recommend that sections 204a and 406a be amended to make common carriers by motor vehicle and freight forwarders, respectively, liable for the payment of damages in reparation awards to persons injured by them through violations of the act.

"At present, shippers using motor common carriers and freight forwarders subject to parts II and IV of the act, respectively, have no redress either before the Commission or in the courts for the recovery of unlawful charges on past shipments. Such remedy is available only with respect to violations by railroads and other carriers subject to part I and water carriers subject to part III.

"Prior to the Supreme Court's decision in *T.I.M.E., Inc.* v. *United States* (359 U.S. 464), decided May 18, 1959, the Commission, upon petition, passed upon the reasonableness of motor carrier rates on the assumption that the petitioner was entitled to maintain an action in court for reparations based upon the unreasonableness thereof. In that case, however, the Court ruled that a shipper by motor carrier subject to part II has no right to maintain such an action. Since we have no authority under the act to award reparations based on unlawful motor carrier rates, a shipper is without a remedy for injuries sustained from the application of such rates. Moreover, since the pertinent provisions of part IV are similar to those in part II, it appears that a shipper by freight forwarder is in the same plight.

"Our experience in these matters, both in proceedings ancillary to court actions and in the informal handling of complaints, shows a definite need for remedial legislation. Although our experience under part IV has not shown the need to be as pressing with respect to freight forwarders, it seems desirable and logical to have the four parts of the act uniform in this respect."

It is emphasized that the Commission has recognized the importance of this remedial legislation, particularly since there has been some time to observe the

effects of the Supreme Courts' decision in the *T.I.M.E.* case referred to in the above quotation.

Your attention is also directed to the report entitled "National Transportation Policy," dated January 31, 1961, which is a preliminary draft of a report prepared for the Committee on Interstate and Foreign Commerce of the U.S. Senate by the Special Study Group on Transportation Policies in the United States. Part IV of this document deals with the organization of transportation law and chapter 2 of that part points up some of the inconsistencies noted in statutes regulating transportation. Your particular attention is directed to the section on page 146 of the report entitled "Reparations and Penalties." Referring to reparation, the report says "There is no doubt that such a provision can be an effective deterrent against excessive rates." The special study group raised the question as to why this reparation provision should not apply to all common carriers and possibly to all carriers for hire. The report continues that if this provision has no effect it should not apply to the railroads and that it is difficult to reconcile with the declared national policy of the Congress "to provide for fair and impartial regulation of all modes of transportation."

Prior to the decision of the Supreme Court in the *T.I.M.E.* case the Interstate Commerce Commission by a series of decisions had interpreted the Motor Carrier Act to permit a shipper to sue in the courts for damages resulting from excessive or unlawful rates. However, the procedure was cumbersome, requiring first a suit by a shipper in a court and second a determination by the Commission that the rates had in fact been unreasonable or otherwise unlawful.

In hearings before congressional committees covering earlier legislation on this subject, motor carrier operators and freight forwarders have contended that there was no need for a revision of the law since shippers already had the right to obtain reparation. The motor carriers and freight forwarders said that the elimination of the requirement to file a suit in a court in addition to a proceeding before the Interstate Commerce Commission would invite a large number of claims, thus placing an undue burden upon the motor carrier and freight forwarder industry. The decision in the *T.I.M.E.* case, however, has now completely abolished any opportunity for a shipper to obtain redress on shipments moving by motor carriers and freight forwarders even though the charges assessed and paid were excessive, unreasonable, or otherwise unlawful.

A proceeding now before the Interstate Commerce Commission in ICC Docket No. 33518, "Terminal Charges on Order Bills of Lading Shipments," points up the need for the changes in the Interstate Commerce Act provided under H.R. 5596. This proceeding involves tariffs issued by most of the Nation's motor carrier rate publishing bureaus with provisions for an additional destinational terminal charge of $3 per shipment, and higher, for shipments moving under order bills of lading. While some of the tariffs involved were suspended by the Commission, the proceeding was not completed by the time the 7-month suspension period had expired. Because of the inability of the Commission to reach a decision before the expiration of the suspension period these charges became effective. If the Commission should now find the order bill of lading charge published and in effect is unlawful or unreasonable, the shipper has no recourse for the damages he has suffered.

While a finding of unreasonableness would require cancellation of the charge, the shipper has in the meantime been forced to pay the higher rate and has no opportunity for redress under the law. There are other instances where the Commission is unable to complete its investigation within the 7-month suspension period, the increased rate becomes effective and is subsequently found unlawful. Consequently, an increased rate may be in effect for a number of months before final disposition of the case finds the Commission in agreement with the position of the shipper, expressed in his protest and request for suspension, by declaring the rate unlawful. Thus it can be seen that where a rate or charge is subsequently found unlawful or unreasonable the shipper has no recourse against a motor carrier or a freight forwarder for the excessive charges paid.

In conclusion, we urge that H.R. 5596 be reported favorably in order to avoid the present discrimination and undue burden placed upon shippers and provide for the necessary equality of regulation with respect to the transportation services via all forms of transportation.

Mr. FRIEDEL. Are there any questions?

Mr. COLLIER. Just one question.

Mr. Franzen, section (c) of the legislation provides that action shall be brought by a complainant and filed with the Commission within 3 years from the time the cause of action accrues. Do you think the 3-year provision in this section is a good and reasonable provision? Should it be less or should it be extended beyond the 3 years?

Mr. FRANZEN. In my opinion, 3 years would be sufficient.

Mr. COLLIER. Would this not possibly open the door to a shipper accumulating a record of overcharges against one particular carrier, and at the end of these 3 years, then go in and file a singular action for the accumulated damages over this 3-year period, might not that open the door to——

Mr. FRANZEN. The provision you are talking about is the one dealing with overcharges and not the reparation with respect to damages on unreasonable rates. And that provision calls for a 2-year statute.

Mr. COLLIER. The recovery of overcharges is the 3-year provision.

Mr. FRANZEN. That is already in the act. That is not a change.

Mr. COLLIER. And to your knowledge there has been no common practice of accumulating damages for this period of time and then coming in later and filing a complaint at the end of 3 years?

Mr. FRANZEN. I am not aware of this having taken place. This 3-year statute on overcharges, of course, is not applicable with other types of transportation, railroad transportation, for example, and up until some years ago there was a lack of uniformity even with respect to that statute.

Mr. COLLIER. Thank you very much, sir. That is all I have.

Mr. DEVINE. No questions, Mr. Chairman.

Mr. FRIEDEL. Thank you very much.

Mr. H. O. Mathews, vice president in charge of transportation for Armour & Co.

Since he is not here, the statement will be included in the record.

(The statement follows:)

STATEMENT OF H. O. MATHEWS OF ARMOUR & CO., IN SUPPORT OF BILL H.R. 5596

My name is H. O. Mathews. I am vice president in charge of transportation for Armour & Co., Chicago, Ill.

I am active in transportation circles and among other things, am chairman of the legislative committee of the National Industrial Traffic League and a director of the Private Truck Council.

Armour & Co., a Delaware corporation is primarily identified as being a meat-packer although our business is not thus limited. We are a major factor in the fertilizer and chemical field and also are very active in the dairy product and pharmaceutical lines. Armour is a very large shipper of various items and distributes our products on a nationwide basis. We are a large user of railroad service as well as common motor carrier service.

I have witnessed the growth of the motor carrier industry. I recall when motor carriers were used primarily for the short-haul business including the transportation of perishable products. However, this situation no longer exists. Long-distance motor transportation is a vital part of our overall distribution. For example, almost all of the meats and packinghouse products shipped by Armour from its midwestern plants to the west coast is via refrigerated motor carrier. It is not uncommon for us to ship from coast to coast via truck. Many of the motor carriers used by us are multimillion dollar organizations.

Armour uses all types of common carriers and their operating authority is dissimilar. We use many specialized carriers of refrigerated or liquid commodities including the general commodity carriers. Some are authorized to transport products from one or a few origins only to all points and places in the entire States. With others the reverse is true, and their authority applies from points and places in several States to only a few points of destination.

Numerous other types of operating authorities exist with differing rate applications and rate philosophies. It is not unusual to have rates established to large destinations with no comparable or properly related treatment given to the so-called intermediate points. Nor is it unique to find the competing producing origins not properly related ratewise on like shipments to same destinations via the same carriers.

Notwithstanding the importance of the motor carrier industry and the substantial amount of products they transport particularly for our company, I am advised by counsel that under the existing law no recovery may be made of any charges paid by Armour if such charges represent those which were duly filed in a tariff with the Interstate Commerce Commission and permitted to become effective. This is true even if such charges were clearly unreasonable, prejudicial or otherwise unlawful. Even if the motor carrier or carriers involved in a particular situation would admit that the charges collected on past shipments were unlawful, there is nothing we or they can do about it. As a matter of fact, they use the present law as a shield in many cases to cover up the irregularities existing in their rate structures.

It is quite true that the rates for the future may be prescribed by the Interstate Commerce Commission, but past unlawful charges that were paid to the carriers in accordance with applicable tariffs and the damages resulting therefrom, are "immune" under the present law. Furthermore, the existing law is very ineffective in only providing for future rate treatment and sidestepping all lawful obligations for the past. It provides no "deterrent factor." To secure rates for the future is time consuming and very cumbersome. Normal judicial process at a minimum requires several months' time.

Let me demonstrate the present state of affairs by reference to a very extreme situation of which I have personal knowledge. Not too long ago, a specialized motor carrier published a supplement to its tariff. Among other things, a revised stopoff in transit rule was published. The normal charges for this service range from $10 to $15 depending upon the particular carrier. In this case the charge for each stop was intended to be $10. The printer, however, inadvertently printed $10,000 in lieu of $10. All concerned including the carrier did not detect this error and the tariff was filed with the Interstate Commerce Commission. Fortunately our rate people detected this error before the effective date of the supplement and called this to the attention of the carrier who immediately requested and received special permission to cancel same and republish on the correct basis.

The point is, however, that if this supplement would have been allowed to become effective, the only applicable charge for each stopoff in transit would have been $10,000. The carrier admitted the legal dilemma and announced that it had no intention of collecting any such an exorbitant figure. However, under the law he would be obligated to look to us for these charges. The present law not only condones its collection but also insists that the published charges be collected in the first instance. After Armour paid such high costs, there is no legal process by which the carrier could return same to us.

Armour takes no position with respect to the proposal insofar as it applies to freight forwarders because our use of this mode of transportation is extremely limited. This is not true, however, with respect to common motor carriers and we vigorously urge that this bill be adopted to provide safeguards to the shipper when carriers (motor common carriers) which represent large industries do or omit to do unlawful acts as declared by statute. The safeguards we ask are not dissimilar from those existing in the regulations of the railroads, and it is my personal opinion that they are long overdue in the regulation of the motor carrier industry.

Mr. FRIEDEL. Mr. Giles Morrow, Freight Forwarders Institute.

STATEMENT OF GILES MORROW, GENERAL COUNSEL, FREIGHT FORWARDERS INSTITUTE

Mr. MORROW. Mr. Chairman, I do not have a prepared statement. I have given the clerk copies of a memorandum to which I will make some reference, and I respectfully request that it be incorporated in the record at the close of my testimony.

Mr. FRIEDEL. Without objection it will be included in the record.

Mr. MORROW. My name is Giles Morrow. I am general counsel of the Freight Forwarders Institute with offices in the Continental Building at 1012 14th Street NW., Washington, D.C.

The institute is the National Trade Association of Freight Forwarders subject to regulation under part IV of the Interstate Commerce Act.

I also am assistant general counsel of the U.S. Freight Co. which, through various subsidiaries, conducts freight forwarding operations in all of the 50 States of the Union, and in most of the foreign nations of the free world.

As the first witness opposing this bill, I feel somewhat overwhelmed by the number and brilliance of the proponents. It is not, however, an unusual role for me.

This identical kind of legislation has been before the Congress off and on for many years. It invariably has been rejected. I have found on checking my records that apparently the first time I appeared befor this committee in opposition to a provision for reparations in part IV of the act was in 1947, 14 years ago. At that time I did a great deal of research on the entire subject, and anyone who is interested in studying the background of reparations as they have been applied in the past will find it interesting to refer to the hearings on H.R. 2324 and H.R. 2295 conducted by the House Committee on Interstate and Foreign Commerce in March of 1947.

Again, in 1949, when the overcharge provisions were written into parts II and IV of the act—the present sections which this bill would amend—this committee had identical legislation, that is, it had a bill before it exactly the same as the current bill.

After hearings, this committee incorporated in parts II and IV the overcharge provisions, the time limitations on suits for overcharges or undercharges, but in reporting the bill it struck out the reparations provision, and this is what the committee said:

> This committee held hearings on H.R. 2324, and on the basis of the testimony given at the hearings decided that it did not favor at this time legislation making reparations provisions applicable to common carriers by motor vehicle and to freight forwarders.

Now I realize that something new has been added, and a great deal has been said about the *T.I.M.E.* decision, *T.I.M.E. Inc.*, v. *United States*, reported at 359 U.S. 464. But the Supreme Court—and incidentally, I agree with the minority of the Court—the minority does quote some testimony of mine in support of its position—but nevertheless, the majority prevails, and the majority of the Court did consider the various statements that are being made here in support of this bill.

I would like to read just briefly from what the Supreme Court said in the *T.I.M.E. decision.* I am quoting:

> Finally, it is contended that denial of a remedy to the shipper who has paid unreasonable rates is to sanction injustice.

There is a footnote No. 19 at this point. The footnote refers to an article by Professor Jaffe in the University of Pennsylvania Law Review. Professor Jaffe was commenting on the *Bell Potato Chip*

doctrine which has already been discussed here a good deal, and it is about that that he says in the footnote:

It is, to be sure, doubtful that reparations in such a case serve a useful function. Rates are under continuous scrutiny. Administrative condemnation implies new circumstances or new understanding rather than serious past injustice. And as Mr. Justice Jackson observes in the *Montana-Dakota* case, the overcharge has usually been passed along by the one who paid it to some undiscoverable and unreimbursable consumer.

Now, going back to the quotation directly from the Court's decision:

The fact that during the 24-year history of the Motor Carrier Act shippers have sought to secure adjudications in the ICC as to the reasonableness of past rates on only a handful of occasions, despite the Commission's invitation to shippers to pursue that course in the line of cases culminating in Bell Potato Chip, supra, strongly suggests that few occasions have arisen where the applications of filed rates has aggrieved shippers by motor carrier.

I might say that so far I know, in my 21-year tenure with the freight forwarders only two such cases have been brought to our attention.

Going back to the Court's opinion:

Furthermore, this contention overlooks the fact that Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and that the statute cut significantly into preexisting rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the "zone of reasonableness." Under the act a trucker can raise its rates only on 30 days' prior notice, and the ICC may, on its own initiative or on complaint, suspend the effectiveness of the proposed rate for an additional 7 months while its reasonableness is scrutinized.

Even if the new rate is eventually determined to be reasonable, the carrier concededly has no avenue whereby to collect the increment of that rate over the previous one for the notice or suspension period. Thus although under the statutory scheme it is possible that a shipper will for a time be forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the ICC has acted on the challenge, it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative "lag."

I think that is a pretty good answer to the charge that it is inequitable to deprive shippers of a remedy.

We say that insofar as H.R. 5596 applies to freight forwarders, it is unnecessary because it is not based on any demonstrated public need; neither the Interstate Commerce Commission nor any shipper who has appeared here has indicated by any factual evidence any real need.

The Interstate Commerce Commission the first time it recommended a reparations provision for part IV in 1955 said substantially what Commissioner Hutchinson said here on the stand the other day; namely, it seems logical and desirable to have all four parts of the act uniform. Now, in its 74th annual report which recommended this legislation, the Commission said this with regard to reparations as applied to forwarders:

Although our experience under part IV has not shown the need to be as pressing with respect to freight forwarders, it seems desirable and logical to have the four parts of the act uniform in this respect.

I suggest that not only has the need not been shown to be pressing, it has not been shown to be present. No instance at all has been cited why it is necessary in part IV. If uniformity is desirable, I suggest

that the way to achieve uniformity is to remove reparations from parts I and III of the act. That is what the Interstate Commerce Commission for many years recommended to the Congress as set forth specifically in the memorandum that I have handed up to the bench.

As has been indicated in what I read from the Supreme Court decision in the *T.I.M.E.* case, increased rates filed by any carrier can only become effective after 30 days' notice to the public. The shipper has a right to protest any of those rates, and if he can make out even a prima facie case they will be suspended for a period of 7 months. After the rates become effective the shipper has a right to bring a formal complaint and have the reasonableness of the rates tested for the future. We simply say that he should not have a right to have the rate tested for its reasonableness in the past.

I would just like to show you how competition does regulate rates today. In the 74th annual report of the Commission for the year 1960 filed with the Congress, there is a section on page 40 dealing with suspensions. It says that a total of 4,252 rate adjustments involving changes in tariffs or schedules of rail, motor, freight forwarder, and express carriers were disposed of by the Board or Division 2 of the Commission. Practically all of the adjustment had been protested. Of the total, 127 represented increases, 3,978 reductions, and 105 both increases and reductions.

Now, what does that mean? An insignificant fraction of all the rates protested and suspended represents increases today. So the fight is over reductions. There were nearly 4,000 reductions suspended last year as against 127 increases. So the competition adequately protects the shipper today.

Now, there is a special circumstance involving freight forwarders which would make this kind of legislation work a severe hardship in our case.

The freight forwarders handle a great many small shipments. In the year 1960, according to ICC figures, the industry handled approximately 25 million shipments with an average weight of 328 pounds.

Now, we do not fear any reasonable method of obtaining redress by the shipper against truly unreasonable rates that we might charge; we never had any trouble under the old *Bell Potato Chip* doctrine. But under this so-called easy method, where experience in the past indicates that a great many claim sharks will spring up, with that great number of shipments which our industry handles compared to the total volume of its business, we would be literally swamped with claims, we fear, and we think that in many cases we would be better off to pay the claim as a tribute rather than to defend it, even before the Interstate Commerce Commission.

I would like to point out, too, that the way this reparations provision has worked in the past, has not been according to the ordinary law of damages. In the case of an alleged unreasonable rate, as the courts have interpreted the reparations clause in part I, which is identical to that provided by the bill, the shipper never has had to prove that he suffered any actual injury in a pecuniary way at all.

All he has to do is to prove that the rate is unlawful in some respect.

Now, it always has been held that an unlawful rate is a public wrong, but that does not necessarily indicate that private injury flows from public wrong. Nonetheless that is the way it has worked. The

Commission deplored that situation for many years. And if you read the memorandum I sent up you will understand why.

I think one of the most cogent examples of how the provision for reparations has worked inequitably against the carriers is the case of *Adams* v. *Mills*, reported at 286 U.S. 397. In that case the Supreme Court awarded reparations on rates for the movement of livestock, and it awarded the reparations to the commission merchants in Chicago who had received the livestock shipments from the growers in Texas, had sold the livestock, paid the freight charges, and immediately deducted the freight charges from what they sent back to the shipper. In other words, they got their commission, but because they paid the freight charges in the first instance they brought a complaint before the Commission, and the rates were found unreasonable.

The commission merchants collected the reparations. And that is the way it always has worked. It is not a question of proving injury, it is simply the doctrine of the first step, proving the rate unreasonable, and then collecting.

Now, we do not think that is right.

And while I think that we have submitted convincing proof that there is no need for this kind of a provision in part IV of the act—the motor carriers will speak for themselves—if it is nevertheless found by your committee necessary or desirable to provide some type of reparations, I think we at least ought to cure this situation of which the Commission complained.

Let me just read a provision from this memorandum I have sent up. On page 5 the Commission says:

> The fact suggested by the court in the *Darnell-Taenzer* case, that in the end the public probably pays the damages in most cases of compensated torts and that the ultimate consumer who may have been actually damaged by the unreasonable charge cannot recover, appears to be an insufficient reason upon principle why the shipper, who eventually has not been damaged, should be allowed to recover. The exaction of an unreasonable charge by a carrier is a public wrong; but there is a clear distinction between a public wrong and private damages.

Turning over to the very last paragraph of the same memorandum, the Commission said:

> The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9, and 16 of the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage.

I will not continue with the reading. But I would like at this time to hand up to the bench if I may a brief amendment to one section of this bill which would do exactly what the Commission there recommended. We still oppose it. I think there is no necessity for the bill. But if we must have reparations, let us require that they be paid only on proof of damage. And the only new language is the italicized portion. This would amend subsection (d) beginning on line 20 of page 8 of the bill and runing through line 2 of page 9 of the bill. There is a comparable provision with regard to motor carriers, but I am dealing only with the part with respect to freight forwarders. And I think Congress would want to add this requirement:

> If, after hearing on a complaint, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof by any freight forwarder, the Commission shall make an order directing the freight forwarder to pay to the complainant the

sum to which he is entitled on or before a day named: *Provided, That if the award is based on the exaction of a rate found to be unlawful under section 404 of this part the sum ordered to be paid shall be limited to the amount of pecuniary loss actually suffered by complainant, as shown by competent proof, and damages shall not be presumed to result from the payment of a rate found to be unlawful but the burden shall be upon complainant to show the actual amount by which he suffered and ultimately bore pecuniary loss.* [Italicized portion indicates addition.]

If, as I say, it is decided that we shall have a provision for reparations, I think it is only reasonable and fair that the carriers be required to pay damages only where there is actual proof of any.

Mr. FRIEDEL. Very fine, Mr. Morrow.

Did I understand you to say that you had only two cases for reparations—the freight forwarders?

Mr. MORROW. Yes, sir. Under the doctrine that prevailed prior to the *T.I.M.E.* decision whereby the shipper could file suit in court and then go to the Commission and ask the Commission to make a determination of reasonableness, I find two cases under part 4 where the shipper did that, and in each case the Commission found there had not been unreasonableness, and the matter was ended without a verdict for the complainant.

Mr. FRIEDEL. Do you think you could explain for the record what is the legal rate and then the lawful rate?

Mr. MORROW. Yes, sir; I think it was explained accurately yesterday. All rates on file with the Interstate Commerce Commission, as soon as they are accepted by the Commission, are legal rates. They are established according to the law, and, therefore, are legal rates. The rate might be unlawful because it might violate some other part of the act. The unlawfulness might be the latent—might not be determined until somebody brings a complaint and says, "This legal rate that is on file nevertheless violates some other provision of the act and, therefore, is unlawful." Whereupon, the Commission, if it so found, would declare the rate to be unlawful and it would be canceled, and it would cease to be either legal or lawful at that point.

Mr. FRIEDEL. Mr. Staggers, any questions?

Mr. STAGGERS. I would like to know if you have any estimates of what the bill would mean to you or to your group in dollars and cents.

Could you in any way estimate that?

Mr. MORROW. No, sir; I could not.

As I tried to indicate, I think its primary cost to us would be its nuisance value. The Commission in a great many of its reports pointed out that there were a great many claims people, called by some claims sharks, who under the easy method of filing reparations claims, on a 50–50 basis, at one time caused the Commission a great deal of concern, and almost bogged down its work.

But then in 1932 we had a decision by the Supreme Court in what is called the *Arizona Grocery* case. It is cited in this memorandum somewhere.

In that case, the Supreme Court said to the Commission:

You may not make an award of reparations against a rate which you yourself have fixed in the past.

That is, in this case the Commission at one time prescribed a maximum reasonable rate for the railroads. They said, "Within this zone of reasonableness your rate will be all right," and the railroads established a rate within that zone of reasonableness.

At a later date, a shipper brought a complaint and the Commission awarded reparations saying it was mistaken in the first instance. The court said:

> You can't do that. If you prescribe a rate you are acting in a legislative capacity and fixing the rate for the future, and you can't later change your mind and then award reparations on it.

So that made reparations cases under part 1 almost dry up. We don't have very many.

The Commission has in large measure prescribed or fixed maximum reasonable rates for railroads.

They have not fixed maximum reasonable rates for motor carriers or freight forwarders so that we would be subject to the same bad practices, we think, which prevailed under part 1, up until about 1932 when the *Arizona Grocery* case was decided.

So it would have a great nuisance value. We think we can defend the reasonableness of our rates, as we have in the past, but we would have to defend a great many of these claims—and we have no way of knowing the extent to which they would be filed, but we think it would cause us a great deal of concern and money.

Mr. FRIEDEL. Mr. Collier?

Mr. COLLIER. Mr. Morrow, are you familiar with the specific instance cited yesterday in the testimony of the General Accounting Office on the shipment of aluminum tanks that went from Mira Loma, Calif., to Walker Air Force Base?

Mr. MORROW. No, sir; I regret to say I am not familiar with any of those illustrations they cited.

Mr. COLLIER. In this particular instance, this shipment involved an overcharge of about $1,333 which the Government paid. And it is perhaps rather unfair to ask you this question since you are not familiar with the document that was put in our hands. But assuming this document is entirely correct, do you think that the Government and the taxpayers would be entitled to protection for an award of reparations in a case like this?

Mr. MORROW. Well, it is very difficult to say "No" to that question. I would like to point this out preliminarily. The shipping officers of the Government do have a duty to find the best and cheapest way.

Secondly, they have a right under section 22 to make contract rates with all types of carriers, and they largely do that.

In my experience in the forwarding industry, nearly all Government traffic moves on a special contract rate, always less than the published tariff rate. So that here there was very bad judgment on somebody's part.

Now, insofar as—getting right down to the question, my suggested amendment would certainly authorize reparations in that case, because there would be no question but that the Government bore the charges; it has nobody to pass along its unreasonable charges to. It can't add them onto its bill.

So that if instances such as this should persuade you that reparations are necessary, then I suggest the amendment I have handed up.

Mr. FRIEDEL. Mr. Jarman?

Mr. JARMAN. Do you feel that there should be uniformity of regulations as to all forms of common carriers?

Mr. MORROW. Not necessarily. I think that there should be substantial uniformity, but if there are differences in circumstances and conditions with respect to two industries, I don't think there should necessarily be uniformity.

There are many instances in the law where there is not uniformity.

Mr. JARMAN. Well, on the particular question we have before us in this legislation, do you think that there should be uniformity as affecting railroads and truckers and the other forms of transportation?

Mr. MORROW. Yes, sir. I would think that whatever is done here should be done also with respect to part 1 of the act. I have tried to point out that the passage of this bill will not necessarily achieve uniformity, because there are differences in the industries. We handle many small shipments, and so do the motor carriers, and we are not in either case protected by the *Arizona Grocery* case doctrine, because the Commission hasn't fixed the majority of our rates.

But I do think there should be uniformity in fact, not necessarily uniformity in form, and if anything should be done, I think it should be done under part 1 and part 3. And I think it is wise at this time to examine the whole question de novo, and if reparations as applied in the past are no longer necessary, I think they should be stricken from all parts of the act.

Mr. JARMAN. In one statement this morning it has been said, referring to reparations, that there is no doubt that such a provision can be an effective deterrent against excessive rates.

Do you agree with that?

Mr. MORROW. In today's highly competitive system, I don't see how it can have very much effect against excessive rates. We make our rates today very generally based on, I guess you can call it what the traffic will bear, but what the traffic will bear is increasingly what the shipper can buy the transportation for in some other market or what it will cost him to supply his own trucks. That is another choice that the shipper has used increasingly.

And those figures that I cited about the suspensions, 4,000 decreases as against 127 increases in a year's time, indicate to me that the competition is controlling the excessive rates today.

Mr. JARMAN. That is all, Mr. Chairman.

Mr. FRIEDEL. Mr. Devine?

Mr. DEVINE. Mr. Morrow, I believe you are the first witness who has testified in opposition to this proposed legislation. Do you know of others that are opposed?

Mr. MORROW. Yes, sir; Mr. Fort who will follow me for American Trucking Association, will indicate the opposition of that organization, which represents all of the truck lines of the country.

In other words, the two affected industries, forwarders and motor carriers, are opposed to the bill.

Mr. DEVINE. That is all.

Thank you.

Mr. FRIEDEL. Thank you very much, Mr. Morrow.

(The memorandum submitted by Mr. Morrow and suggested amendment follow:)

MEMORANDUM BY GILES MORROW, GENERAL COUNSEL, FREIGHT FORWARDERS INSTITUTE, REGARDING BILL H.R. 5596

(NOTE.—In its 33d annual report to Congress, for the year 1919, the Interstate Commerce Commission thoroughly reviewed the history and interpretation of the reparations provisions of part I of the act. By that report the Commission recommended to Congress that the reparations provisions be revised so as to provide that no person should be entitled to reparation except to the extent that he shows damage. In its 1920 and 1930 reports the Commission repeated this recommendation. Although the Commission has since changed its point of view, its earlier recommendations are both interesting and pertinent to the situation today. Accordingly, the recommendations from the 33d annual report are reproduced below.—Giles Morrow.)

REPARATION

In our 30th annual report to Congress, in December 1916, we said:

"In connection with the question of reparation on account of an unreasonable rate charged it should be borne in mind that the standard of reasonableness under our act is not a definite fixed standard. That is to say, whether a certain rate is reasonable or not often cannot be known by the carrier until the Commission has passed upon it. Now, in seeking reparation on account of an unreasonable rate, complainants frequently invoke the common law in support of their claims, but we have been referred to no common law case where the standard exceeded by the carrier was not a fixed definite standard which the carrier knew and was bound to observe. The act contemplates that we shall find rates reasonable or unreasonable according to whether, in our opinion, the rate bears a proper relation to the service rendered. But this is preeminently a question upon which opinions of the Commission and of the carriers may differ, and the act contemplates an original exercise of the carriers' judgment."

We also pointed out that as its awards and reparation are only prima facie evidence in the court and as they must be enforced in the courts, if not paid by the carrier, the rights of a shipper might be sufficiently protected by amending the law so as to *place the power to award reparation exclusively with the courts.*

The Supreme Court has since dealt with the rights of shippers to reparation where the rates are found to be unreasonable in *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U.S. 531. The defense of the carriers in that case was that the complainant was not damaged and that it had in fact passed the unreasonable charge along to the consumer in the price of his goods. As to this the court said:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim occurred at once in the theory of the law and it does not inquire into later events. * * * If it be said that the whole transaction is one from a business point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier. * * * The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum. * * * Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result, 13 I.C.C. 680. Probably in the end the public pays the damages in most cases of compensated torts.

"The cases like *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 239 U.S. 184, where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less, are not like the present. There the damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should not have been required of them, and there is no question as to the amount of the proximate loss. See *Meeker* v. *Lehigh*

Valley R.R. Co., 236 U.S. 412, 429. *Mills* v. *Lehigh Valley R.R. Co.*, 238 U.S. 473."

Under the act to regulate commerce there are three principal public wrongs: (*a*) To exact an unreasonable rate is unlawful under section 1; (*b*) to unjustly discriminate is unlawful under section 2; (*c*) to practice undue preference or undue prejudice is unlawful under section 3. Section 8 of this act provides that the carrier—

"* * * shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * * *"

Section 16 provides:

"That if, after hearing on a complaint made as provided in section 13 of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 9 gives the persons claiming to be damaged the right to file his suit for the damages in a court. These provisions empower us and the courts to award damages growing out of violations of the act.

That *damages in a pecuniary sense must be proven upon an allegation of unjust discrimination or undue preference under section 2 and 3 of the act*, and that *no such proof is required upon an allegation of unreasonableness under section 1 of the act allows the cause, character, and measure of the wrong rather than the proof of injury to determine whether damages should be awarded.* That is to say, damages are presumed by the payment of an unreasonable charge, and the *measure of damage is a question of law instead of a question of fact.* The statute does not fix the measure of damages to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise, 211 Fed. 810. On the contrary, it was decided in *L. & N.* v. *Ohio Valley Tie Co.*, 242 U.S. 277, that the damage resulting from the payment of unreasonable rates might be the difference between the rates or it might be the damage to the complainant's business "following as a remoter result of the same cause"; and that the latter "must be taken to have been considered in the award of the Commission and compensated when that award was paid."

We have often said that there is no presumption of damage under the act, and that the distinction is plain between a carrier's unlawful act and the shipper's right to damage, if any, caused thereby. *Oregon Fruit Co.* v. *S. P. Co.*, 50 I.C.C. 719.

The distinction between the rule of damage of the *International Coal* case in respect to the discriminatory rates and the rule of damage in the *Darnell-Taenzer* case in respect to unreasonable rates is apparently based upon what is said to be the common law principle that an unreasonable charge is equivalent to an "extortion" or "overcharge." But there appears to be no real analogy between an action to recover an extortion or overcharge at common law and an action to recover an unreasonable charge under the act to regulate commerce. The common law action is more nearly analagous to an action to recover a charge over and above the published rate. At common law the overcharge was often in fact an extortion. But the exaction of a published charge which is legal under the statute, and which is afterward found to be unreasonable, is in no proper sense an extortion, inasmuch as the law itself requires the payment of the published rate or charge. In publishing rates in the first instance carriers have no way of knowing that a regulating commission will subsequently find a particular rate to be unreasonable. It is understood that common law cases were rare and were usually based upon a breach of contract, i.e., where the carrier forced the shipper to pay a rate or price that exceeded the contract rate or price and was thereby guilty of extortion.

In *Anadarko Cotton Oil Co.* v. *A. T. & S. F. Ry. Co.*, 20 I.C.C. 43, cited by the Supreme Court in *Baer* v. *D. & R. G.*, 233 U.S. 479, we said:

"A rate reasonable in view of the circumstances and conditions when it is established may, in the course of time, become unreasonable by virtue of changed circumstances and conditions. It is manifestly impracticable for the carriers and the Commission in such a case to determine at what exact time in the gradual process of changes a rate becomes unreasonable. It follows that the Commission is not justified in awarding damages in any case except on a basis as certain and definite in law and in facts as is essential to the support of a final judgment or decree requiring the payment of a definite sum of money by one party to another."

The fact suggested by the court in the *Darnell-Taenzer* case, that in the end the public probably pays the damages in most cases of compensated torts and that the ultimate consumer who may have been actually damaged by the unreasonable charge cannot recover, appears to be an insufficient reason upon principle why the shipper, who eventually has not been damaged, should be allowed to recover. The exaction of an unreasonable charge by a carrier is a public wrong; but there is a clear distinction between a public wrong and private damages. *International Coal* case. If the law provided that no recovery shall be allowed for any violation of the act unless the party claiming reparation can show that he suffered pecuniary loss or damage, it would probably result that in some cases the damages could not be proved and the unreasonable charge would be retained by the carrier. If it be felt that it would be against public policy to permit carriers to retain charges found to be unreasonable, it would seem preferable that the carrier be required to pay the unreasonable charge into the Public Treasury than to continue the policy which permits a private individual who has not really suffered damage to recover.

Incidentally, the law now permits carriers to retain certain unreasonable charges. Where rates are found to be unreasonable reparation is awarded only to parties claiming it within the statutory period. The unreasonable charges exacted from others are retained by the carrier. And as already pointed out, an unreasonable rate under existing conditions is in the last analysis a matter of judgment, and in a legal sense is not generally an extortion. If the amendment suggested by us in 1916 were adopted, provisions should be made to the effect that reparation for unreasonable rates or charges should be awarded in the courts only upon finding by the Commission that such rates or charges were unreasonable as of a particular time and during a particular period. Otherwise, different courts might reach different conclusions as to the amount of the reparation, and the results would be unfortunate.

The law might well affirmatively recognize that private damages do not necessarily follow a violation of the act; and provide that sections 8, 9, and 16 of *the act shall be construed to mean that no person is entitled to reparation except to the extent that he shows that he has suffered damage.* The close analogy between a relatively unreasonable or unjust rate and an unjustly discriminatory or unduly prejudicial rate, and the difficulty of determining just when a rate becomes unreasonable or that it is unreasonable per se, suggests that the law should provide that if a rate is found to be unreasonable the rule of damages laid down in the *International Coal* case should control.

What is said herein is not intended to relate to discriminations knowingly planned or practiced which may be the subject of prosecutions before the courts.

[Emphasis added.]

Mr. FRIEDEL. Mr. Fort?

Mr. STAGGERS (presiding). You may proceed.

STATEMENT OF JAMES F. FORT, COUNSEL-PUBLIC AFFAIRS, AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. FORT. Mr. Chairman and gentlemen of the subcommittee, my name is James F. Fort. I am counsel-public affairs of the American Trucking Associations, Inc., with offices at 1616 P Street, NW., Washington, D.C. The American Trucking Associations, Inc., as most of you know, is the national trade association of the truck industry representing all types of trucking, both private and for hire.

My appearance today is in opposition to H.R. 5596.

The American Trucking Association's opposition to a reparations provision in part II of the Interstate Commerce Act is not new. We have opposed such a provision many times before this committee and before the Senate. However, developments, particularly insofar as certain court decisions are concerned, have made the issue more acute, at least in the eyes of the proponents of this legislation. These developments necessitate at least a brief reference to some historical background.

As the committee knows, the railroads, under part I of the Act, have had a reparations provision for many years. At the time our industry first came under Federal regulation in 1935, the Congress decided against the imposition of a reparations provision. However, some years ago, following the so-called *Bell Potato Chip* case, a procedure was established under which there existed a form of reparations for the motor carrier industry. Under the so-called Bell Potato Chip doctrine a shipper could bring suit in Federal court alleging the past unreasonableness of an existing motor carrier rate. The court would suspend the proceeding and say to the shipper, "go to the Interstate Commerce Commission and get a ruling on this rate."

The Commission would then pass upon the rate and if the shipper received a favorable ruling he would take this back to the court and the court would then order the motor carrier to pay back to the shipper that part of his rate held to be unreasonable.

Then in 1959 came the Supreme Court decision in the *T.I.M.E.* case and the *Davidson* case. The Court held that the Interstate Commerce Act gave the Commission no authority to pass upon the past unreasonableness of a motor carrier rate. And so we have no reparations-type procedure applying to motor carriers today.

Let's face this issue squarely. There is no need to have such a provision now and we ask this committee not to visit such an unhealthy situation on the trucking industry.

The fact that there exist reparations provisions in the Interstate Commerce Act applicable to railroads and water carriers is no reason for the imposition of a similar provision in part II. We favor equality of regulation. This does not mean, however, that all things that apply to one mode should automatically be made to apply to all. Regulation should be equal—but it should also be fair. We see no fairness in a provision which requires that a carrier should retroactively refund money to a shipper. If we are looking for equality on a fair basis, then let us repeal the reparations provisions that apply to the other modes.

May I invite the attention of the members of this subcommittee to the fact that the reparations provisions in parts I and III of the Interstate Commerce Act sit in a most lonely position since none of the other major regulatory acts include reparations provisions. The Federal Aviation Act (as approved by this committee in 1958), the Federal Communications Act, the Federal Power Act, and the Natural Gas Act are examples of other utility regulatory laws which do not include any provision for reparations.

It is appropriate here to note that at the time that the reparations provision was inserted in the Interstate Commerce Act in what is now part I, there was no provision authorizing shippers to protest the future unreasonableness of a rate change before that rate change took effect. As I will show in a moment, entirely adequate provisions are included in the act today to protect shippers against future unreasonableness in rates. In reality the reparations provision in part I has no justification but is a residual legacy around the necks of the railroad industry left over from a time when there was a legitimate need for such a remedy. These facts add weight to my statement of a moment ago that reparations provisions, rather than being extended to motor carriers, should be repealed as to rail and water carriers.

There are approximately 17,500 motor carriers in the United States that would be subject to this bill. Of these, the vast majority are truly what may be called small carriers. Specifically, 14,800 of these carriers have revenues of less than $200,000 per year or an average for these carriers of only $90,000 gross revenue per year.

These facts alone constitute one of the most cogent reasons which militate against a reparations provision in part II.

While motor carriage has passed out of its "childhood" it still has a long way to go in achieving a stability of maturity. Throughout the country the industry is composed of many, many thousands of units, yet for every carrier that might be sufficiently matured to withstand exposure to reparations, there are hundreds of carriers who have neither the technical assistance nor the financial background to weather the strains which such a section would place upon them.

All of these carriers perform a vital function in their own particular niche, yet a sizable reparations claim could drive any one of them to the wall. We have seen such happenings as the result of a presentation of an ordinary sizable claim. If it became necessary for each and every carrier to engage the technical knowledge necessary to protect themselves against such possible contingencies not only would there be a tremendous shortage of personnel, but the astronomical increase in transportation expense which would have to be translated into the rate structure would far outweigh the benefits to the shipping public (which we assume is the reason for the proposed enactment).

In this connection it must also be borne in mind that such benefits would accrue only to a relatively selective handful—those who have the financial wherewithal and technical skill to prosecute successfully a reparation proceeding. The balance of industry generally, the thousands of manufacturers who have no "traffic managers" as such would benefit not at all except it be through the efforts of some claim bureau.

Further, passage of this legislation would necessitate the establishment of money reserves against the contingency of a reparations award.

Not only would such a necessity be extremely difficult in an industry as hard pressed as ours but also it might very well result in higher freight charges for the very people supposed to be benefited by this bill.

If H.R. 5596 were enacted, we do not know how many additional personnel would have to be added to the payroll of the ICC. We do know that it would necessitate an addition of a substantial number or, in the alternative, a substantially greater workload on existing employees. This committee has expressed grave concern over the backlog of cases before regulatory agencies and certainly would not desire to add another duty on top of the many already within the jurisdiction of the Commission.

For reasons that I will explain in a moment, there are far fewer reparations claims filed against the railroads than would be filed against motor carriers.

Employees would, of necessity, not be added but would be multiplied if this bill is enacted.

There are those who today make their living by auditing the records of shippers in search of potential claims to file against motor

carriers for matters—such as clerical mistakes—on which the carrier is liable. If H.R. 5596 is enacted these same "sharks" would turn gleefully to new areas of harassment.

Again the difference between a rail and a motor carrier operation is important. Our industry does not have the "system" of railroading. There are thousands of opportunities among the thousands of motor carriers for possible claims.

The committee should also know that these individuals pocket as much as 50 percent of moneys recovered. Further the unscrupulous claim shark will hold the filing of claims until a large amount of money is involved and then make his claim.

In other words, these people will catch an unsuspecting carrier in an error and instead of calling it to the shipper's attention he will just sit on it until the kitty has been fattened and then he will move.

Passage of the pending bill would vastly increase the possibility of such practices.

As the committee knows, the existing provisions of the Interstate Commerce Act provide very exacting procedures to be followed in establishing rates today. Included among the protections which you have written into the law is the right of any carrier or shipper to protest any proposed rate change before it goes into effect. This is a daily occurrence at the ICC. Protests are filed before the rate becomes effective and we can see no reason why the shipper should be given a second change to complain retroactively of a rate.

The committee knows also that any shipper has a second chance today to complain of a rate. The way is always open for the shipper to file a formal complaint with the Commission on any rate. Of course, this second chance would be prospective only, but this is as it should be.

The fact is that many large shippers have extensive traffic departments and these large shippers are in many instances better equipped than small carriers to determine the prospective reasonableness of motor carrier rates. The reverse is also true—large motor carriers are better equipped than small shippers to determine the prospective reasonableness of rates. Such a situation does not give rise to any pressing demand for placing the carriers under the burden of a reparations provision.

A further and important factor protecting the shipper against unreasonable charges today is the existence of extreme competition among the surface carriers. Carriers today are faced with competition from other for-hire carriers, from rail carriers, and from the constant threat of private carriage on the part of the shipper.

These pressures are great and their net effect is to make motor carriers ever more mindful of their rates. Thus the very existence of pervasive competition acts as a brake on unreasonable rates.

Years ago when the reparations provision was applied to the rail carriers this intermode competition did not exist, private carriage was not a threat and there was every reason to provide the protection of such a provision. These reasons do not apply today and accordingly there exists no need for the passage of H.R. 5596.

A few minutes ago I stated that, if H.R. 5596 were enacted, there would be far more reparations suits filed against motor carriers than against railroads. Let me explain, as our final and perhaps most con-

clusive point, why this is so. In 1931 the Supreme Court of the United States in what is known as the *Arizona Grocery* case, to which Mr. Morrow referred, held that there could be no reparations awards made on rail rates that were specifically prescribed by or specifically approved by the ICC.

In other words, the Commission was told, "If you have once said that particular rail rates are reasonable then you cannot reconsider them at a later date and decide that they were retroactively unreasonable."

The net effect of this decision was to place a vast quantity of railroad rates outside the reparation provision of the law for the Commission has passed upon the maximum reasonableness of all of the rail class rates, which comprise most of the rail rates.

No such situation exists in the motor carrier rate area. Most motor carrier rates have neither been prescribed nor specifically passed upon by the ICC as to their maximum reasonableness. In other words, the existence of the present reparations provision in part I works no particular hardship upon the railroad industry but its imposition in part II could be ruinous for the motor carrier.

The Congress, in its wisdom, has placed motor carriers under Federal regulation through its arm, the Interstate Commerce Commission. The Congress has given to the ICC broad outlines of the regulation that is to be imposed upon the carriers engaged in interstate motor transportation and it has set forth the national transportation policy to act as an even more general guide.

The national transportation policy declares the policy of Congress—

to provide for fair and impartial regulation of all modes—to encourage the establishment and maintenance of reasonable charges for transportation services * * *

This is your directive to the Commission.

At this moment the Congress, the Executive, and the public are all concerned about the survival and continued health of the common carrier segment of the transportation industry. The Senate Commerce Committee has announced the resumption of a hearing on the reasons for the decline of common carriage. We welcome this concern because we share it. We believe that there are many steps which you can take to strengthen our transport system.

The passage of H.R. 5596 will not strengthen, improve, or help our common carrier system in any way. To the contrary, it can only have the effect of further weakening of a vital segment of the Nation's economy.

An ancient philosopher is credited with the wise saying, "There is no right way to a wrong thing." We respectfully urge that this subcommittee not favorably consider H.R. 5596.

Mr. Chairman, if I may add one comment here, I noted Mr. Morrow's proposed amendment, and while the motor carrier industry, as I have several times stated, opposes the enactment of this bill, if the committee should see fit to enact a reparations provision, we certainly believe that the amendment proposed by Mr. Morrow should be added to the bill. It would have to be added at the appropriate place in the bill applying to motor carriers. As he proposed it, of course, it applies only to the freight forwarder industry.

That would conclude my statement, Mr. Chairman.

Mr. STAGGERS. Mr. Fort, you say if we didn't pass the bill, but if we did pass the bill, would you be in favor of this amendment?

Mr. FORT. We would, sir.

Mr. STAGGERS. As it would pertain to motor carriers and freight forwarders?

Mr. FORT. That is, the language which Mr. Morrow referred to.

Mr. STAGGERS. We are glad to get your opinion on that.

Would that eliminate what you talk about in your statement here, these "claim sharks" working on these different things to try to get as much as they could get?

Mr. FORT. I don't think it would eliminate them, sir, it would certainly be helpful in their activities.

Mr. STAGGERS. It would curtail them, then, because it would be up to the wisdom of the Commission or the courts to decide?

Mr. FORT. Yes, sir; it would be.

Mr. STAGGERS. That is all the questions I have.

Mr. Friedel?

Mr. FRIEDEL. Mr. Fort, did you hear the testimony about the poultry case from Marionville, Mo., to Chicago?

Mr. FORT. That was the witness for the National Industrial Traffic League, I believe, this morning. Yes, sir; I was here, and I heard his statement.

I am not personally familiar with the case that he refers to.

Mr. FRIEDEL. Dressed poultry, it is on page 13 of Mr. Myers' statement, and he says that the rate charged was $1.29, and it could have been shipped for 48 cents. How does a thing like this happen?

Mr. FORT. It happens, sir, in this way: The motor carriers, as has been said several times here this morning, generally speaking, file their rates through rate bureaus, they are collective groups of motor carriers who get together authorized under the Interstate Commerce Act, and jointly make their rates. Therefore, as one witness mentioned, Mr. Myers, I believe, the rates generally speaking for motor carriers in a given area are the same. Those rates in an area in a situation like this would be made by a rate bureau, and it is conceivable and entirely possible that a rate might be greater for a shorter distance than for a longer distance, according to their way of making that rate.

This particular situation goes to this point, if I may explain briefly. There is a provision in part I of the Interstate Commerce Act commonly referred to as the fourth section.

The fourth section says, in effect, that you may not charge more for a shorter distance than you do for a longer distance. In other words, if you have a rate applying from A to C, you cannot charge more than the rate from A to C from A to B. This is a provision of law in paragraph 1, it is not in part 2 of the Interstate Commerce Act.

However, as a general rule, the Commission outlaws such motor carrier rates when they are protested and when they are complained of.

Had this rate been complained of by the shipper, at the time the rate went into effect, the Commission undoubtedly would have outlawed that rate right then and there.

This is the exact illustration of what I spoke of in my testimony, that an adequate remedy exists today for that particular shipper. Had he protested that rate when it went into effect, the chances are very good that that rate would have been set aside.

Had he later filed a formal complaint about that rate, it probably would have been set aside.

We don't feel that that shipper, having those remedies today, should be allowed to come in at a later date and tell us, the motor carriers, "Let's go back to the time we first shipped our first load of chickens and collect back the money that we paid to you."

Mr. FRIEDEL. Mr. Collier raised a question which I think was very important, that if a shipper has 2 or 3 years to file a complaint, lets them all pile up and then comes to the motor carrier and says, "You owe me so much money," and files a complaint, how seriously would that affect a motor carrier?

Mr. FORT. I noted Mr. Collier's questions to Mr. Morrow, and I thought of my own statement at the moment he asked the question. And, as I said in my statement, for a claim bureau, or as we in our industry frequently refer to them, a claim shark, to hold a claim or to discover an error on the part of a carrier (maybe a clerical error today, but if this bill were passed a rate which he believes unreasonable), and for him to hold that for a period of time and then to make his claim on it, how severe that would be is impossible to tell. Obviously, only the unscrupulous agent would pull such a trick, but it is, of course, always a possibility, and it has happened in the past on motor carrier claims today.

Mr. FRIEDEL. Just one more question.

If we were to adopt the amendment, would the shipper, or could the shipper get a cheaper rate—could he come in with a claim as in the poultry case, where he knows the rate is excessive, could he then come in and ask for rebate?

Mr. FORT. I think perhaps what you are asking is, Would the rate continue in effect after a reparation case were filed complaining of that rate?

Mr. FRIEDEL. No, in that particular case he filed a complaint and later on found that he could have shipped it for 28 cents instead of $1.60. How would he be protected in collecting excessive charges?

Mr. FORT. I am not sure I understand your question.

Mr. FRIEDEL. If we were to adopt the amendment, would this block him from making a claim that the rates were excessive?

Mr. FORT. You are speaking of the amendment proposed by Mr. Morrow?

Mr. FRIEDEL. Yes.

Mr. FORT. Most assuredly not, provided he could prove, as the amendment says, that it would limit him to the amount of the pecuniary loss actually suffered by the complainant, as shown by the competent proof, and it would limit him to the amount by which he suffered, and ultimately bore a pecuniary loss; in other words, if he were the shipper, as in this instance the poultry case, and he sold the poultry, he paid the freight charges, he did everything, and consequently he was the person who lost the money as a result of the unreasonable charge on the part of the motor carrier, most assuredly he would be able to collect back his money if he could prove it to the satisfaction of the Commission or the court.

Mr. FRIEDEL. That is all.

Mr. STAGGERS. Mr. Collier?

Mr. COLLIER. Yes.

Mr. Fort, in the paragraph of your statement which is entitled "The Shipper Is Adequately Protected Today," you point to the shipper's right to protest any proposed rate change before it goes into effect. This, of course, is true. But is it not just true to a point? There are, I believe, millions of dollars worth of shipments being made by motor carrier daily of commodities that are not under the published rates, and so in these cases this statement or yours would not be applicable, would it?

Mr. Fort. There are millions of dollars worth of freight being moved daily in the United States that are not subject to regulation by the Interstate Commerce Act or by the Commission at all.

For example, fresh fruits and vegetables under the agricultural exemption move daily in interstate commerce in for-hire motor carriers. And they are not subject to the ICC's rate jurisdiction, and, therefore, they would not be subject to this bill at all either.

Mr. Collier. I see. In other words, we leave the shippers of this type of thing still without protection, is that correct?

Mr. Fort. No, sir; not exactly. Since the carrier in that type of situation files no rates, and is not subject to the rate regulations of the ICC, the negotiations of a rate for, let us say, an agricultural product, is simply a matter of negotiation of give and take between the carrier and the shipper.

The shipper says, "I have a load of apples to go from A to B," and the carrier says, "I need $75 to carry from A to B to make a profit," the shipper says, "Well, I won't give you $75, I will give you $65," and they settle for $70.

And that is the situation which exists there.

There is no reparation provision, there is no rate regulation to protect either the carrier on the one hand, or the shipper on the other.

Mr. Collier. Now I would presume that most of the claims for reparations would stem from honest error, so to speak. I think we must assume that.

Mr. Fort. I think that is admitted.

Mr. Collier. Or perhaps in a question of judgment as to the particular classification of a product or commodity being forwarded. If this is the case, in going back to the statement on page 4 in which you point out that sizable claims for reparations could drive a small shipper out of business, for my own information, would there not be some type of comprehensive insurance available to the shipper as there is for damages, cargo mistakes, and so on, that would provide protection against perhaps the destruction of the small shipper under this proposal?

Mr. Fort. I will have to confess, Mr. Collier, I do not know the answer to that. I wondered the same thing this morning when I was reading over my statement, and I do not know whether or not there is any insurance which would cover reparations or not.

Mr. Collier. I can see where it might be difficult to secure if Mr. Morrow's proposed amendment were not adopted. But I would think—and this is strictly my own judgment—that if the amendment were adopted where there had to be an established loss, that then such insurance might be made available under a comprehensive——

Mr. Fort. It is quite possible. I would be very pleased to check with my friends in the railroad and water carriers industries and see

whether or not there is any such insurance available in those industries, and advise the committee.

Mr. COLLIER. Thank you. That is all I have.

Mr. STAGGERS. Mr. Jarman?

Mr. JARMAN. Mr. Fort, in your statement you take the position that there are now entirely applicable provisions to protect shippers against future unreasonableness in rates. You go on to say that included among the protections written into the law is the right of any carrier or shipper to protest any proposed rate change before it goes into effect.

From a practical standpoint, do you take the position that shippers should be able to keep up with the proposed rate changes?

Mr. FORT. On those matters which directly concern them, most assuredly. And I am quite certain that they do.

If I am a manufacturer of paper products, let us say, I can assure the committee that the manufacturer of paper products has a traffic department who is going to watch very closely the rate changes which are made on paper products. And he undoubtedly is not going to be watching the rate changes on electronic equipment or microphones, but he is going to be watching his rates on paper products.

Mr. JARMAN. I was interested in the testimony of Chairman Hutchinson yesterday in which he said, in part, that, for example, during the year ended June 30, 1960, there were approximately 171,679 common carrier freight tariffs proposed. Of these 105,344 were offered by motor common carriers and 11,539 by freight forwarders. And he makes the point that—

> even the preliminary task of determining whether suspension and investigation of proposed changes in rates is warranted would require the examination of many thousands of proposed rates. A task such as this is simply beyond the capacity of the Commission's facilities.

And he goes ahead to say this, and I will ask your comment.

> We understand the view has also been expressed that since a shipper may, by the filing of a protest, invoke the Commission's investigatory power to determine the reasonableness of a proposed rate, he is thereafter precluded from questioning the reasonableness of the rate for the purpose of reparation if he has failed to file such a protest. A requirement of this type would, in our opinion, be entirely unrealistic. This would mean that a shipper would have to exercise constant vigilance over the filing of rates in order that those of interest to him would not escape his notice and become effective without his protest. In view of the thousands of rates filed each year, this would impose a heavy burden upon shippers which many, especially the smaller ones, are not in a position to bear.

I would be interested in your comment.

Mr. FORT. As I understand the burden of the Chairman's statement, he is going right to the point that I have just been talking about, that there are adequate protections today. And, as I said a moment ago, the manufacturer of this paper cup is going to be affected by some of those thousands and thousands of motor carrier rates which are filed every year, be he a large company or a small company.

And I am quite sure that the carrier that has been hauling for that particular manufacturer is going to advise him as a matter of normal business procedure, "Look, I have got to have a rate increase on your paper cups in order to continue to make a profit," and I am quite sure that the shippers are not going to be caught unaware by rate increases.

Remember, rate increases are filed, and they go into effect 30 days after they are filed.

At any time, as I understand it, during that 30 days the shipper has every opportunity to go to the ICC and protest it, and the ICC will, within that period, pass upon it at least perfunctorily, and then if there seems to be some cause for a dispute, or some cause for belief that it is unreasonable, the Commission will suspend that rate for 7 months while they investigate it fully.

I really don't believe that the procedures today warrant the imposition of a reparations provision, they are just so adequately protected, there are so many restrictions on the carrier, he cannot put a rate into effect overnight, he has got to wait 30 days.

Mr. JARMAN. I would think evidence of present law and regulations being effective for the protection of shipper rates might be reflected in how much activity there has been on the part of shippers in contesting any rates that they thought were unfair.

Do you have any figures on protests filed by shippers during any recent period of time?

Mr. FORT. I have just been handed the ICC's 74th annual report, which is its most recent. There were 4,252 rate adjustments involving changes in tariffs of rail, motor, water, freight forwarder, and express carriers disposed of by the board of suspension, division 2, or the Commission.

This, in effect, says that there were 4,252 protests.

Mr. JARMAN. When was that?

Mr. FORT. This was in the fiscal year ending June 30, 1960. There is a breakdown here in the annual report of the Commission showing the number suspended for rail, motor, water, freight forwarder, express, et cetera.

Of those, the motor carriers had 1,043 rate adjustments which were suspended, there is no breakdown here which shows whether these were rate increases or decreases, I think that would be readily available, however.

Mr. JARMAN. Do you take the position, then, that shippers, large and small, are adequately protected under the present law?

Mr. FORT. I do, sir.

Mr. STAGGERS. Mr. Fort, we appreciate your coming up.

And that will conclude the formal hearings on this bill.

And there will be an announcement of an executive session later on.

Before we close, I would like to hear from Mr. Rea.

Do you have a formal statement to include in the record, or has that been included?

(Mr. Rea's statement follows:)

WATKINS & REA,
Washington, D.C., July 5, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics of the Interstate and Foreign Commerce Committee, House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: I write as counsel for, and on behalf of, Middle Atlantic Conference to express opposition to H.R. 5596. I had hoped to be able to testify orally before your subcommittee, and am indeed sorry that I was unable to do so. However, I appreciate your willingness to allow me to file this statement for the record.

Middle Atlantic Conference has a vital interest in this matter. It is a nonprofit membership corporation organized under the laws of the District of Columbia.

Its members comprise some 1,300 common carriers of property by motor operating in all of the States of New England and in New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of Columbia. Pursuant to orders issued by the Interstate Commerce Commission under section 5a of the Interstate Commerce Act, Middle Atlantic Conference is the organization through which its members perform their duty to establish and maintain just, reasonable, and otherwise lawful rates for transportation and just, reasonable, and otherwise lawful regulations and practices in connection therewith. To these ends the conference initiates and participates in administrative and judicial proceedings respecting the rates and practices of all modes of transportation and on rare occasions makes representations to committees of the U.S. Congress. The rarity of such representations is demonstrated by the fact that this representation is the only one the conference has made in the last 6 years, which fact emphasizes the importance it and its members attach to this matter.

H.R. 5596 would overrule *T.I.M.E. Incorporated* v. *United States of America*, 359 U.S. 464, 79 S. Ct. 904. The Supreme Court there held that the only legal rate for the transportation of property by motor carrier in interstate commerce it the rate published and filed with the Interstate Commerce Commission and made effective pursuant to the Interstate Commerce Act, and that no recovery of any portion of freight charges paid on the basis of the legal rate can be had. H.R. 5596 would permit the recovery of damages from motor carriers and freight forwarders on the basis of an ex post facto determination that such legal rates were unjust or unreasonable.

I should like at the outset to try to put this matter in historical perspective because I think that a sound conclusion on the issue of the enactment of H.R. 5596 can only be reached if one views it in that perspective. At least as early as the reigns of the Plantagenet Kings of England it was established that common carriers owed the duty to render service at reasonable and nondiscriminatory prices. From time to time specific prices were fixed by statute. However, until well into the 19th century in both England and the United States the carrier's duty was generally enforceable by way of suit against it to recover the difference between the charges paid and those the court found to be reasonable and nondiscriminatory.

With the expansion of commerce and the rapid extension of railroad transportation following the Civil War, it became evident that the courts were not equipped with the necessary expert knowledge to determine issues relating to rate reasonableness and that their attempts to do so, however conscientious, resulted in confusion and conflict among different courts and among different decisions by the same court. As a consequence uniformity of treatment to like shippers moving their goods in like circumstances was impossible to achieve, and the right to fair and nondiscriminatory treatment was impossible to vindicate.

One solution of this problem attempted was the fixing of specific rates by State statute. See *Minnesota Rate Cases*, 230 U.S. 352. For the most part this proved unworkable. Such rates could constitutionally apply only to movements wholly within a single State. *Wabash Ry.* v. *Ill.*, 118 U.S. 557. Moreover, the State legislatures, most of which meet only every other year, were ill equipped to effect changes in rates with the frequency and dispatch that constantly changing economic conditions require.

The Congress attempted a different solution of the problem with the enactment of the Interstate Commerce Act in 1887. That act created the Interstate Commerce Commission and confided to it exclusively the authority theretofore exercised by the courts, namely the authority to determine whether rates were just, reasonable, nondiscriminatory, and otherwise lawful. It is to be emphasized that the act of 1887 gave the Commission no legislative authority, that is no authority to prescribe rates for the future. As the Supreme Court put it in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 350:

"The act altered the common law by lodging in the Commission the power theretofore exercised by the courts, of determining the reasonableness of a published rate. If the finding on this question was against the carrier, reparation was to be awarded the shipper, and only the enforcement of the award was relegated to the courts. In passing upon the issue of fact, the function of the Commission was judicial in character; its action affected only the past so far as any remedy of the shipper was concerned, and adjudged for the present merely that the rate was then unreasonable; no authority was granted to prescribe

rates to be charged in the future. *Indeed, after a finding that an existing rate was unreasonable, the carrier might put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable.*" (Emphasis supplied.)

The lack of authority in the Commission to prescribe rates and the consequent freedom of the carriers to change them at will severely hampered the achievement of the grand purposes of the Interstate Commerce Act—to promote the free movement of all property in interstate commerce for all shippers at just, reasonable and nondiscriminatory rates. The act was therefore amended, first to give the Commission power to fix maximum reasonable rates and then later to prescribe specific rates. To implement these new powers the Commission was authorized to investigate existing rates, either upon complaint or upon its own motion, as well as to suspend changes in rates for a limited time (now 7 months) pending an investigation of their lawfulness.

The scheme of regulation thus provided has proven the most satisfactory of any yet devised, and has been chosen by the Congress with but one exception in every rate regulatory statute passed since it was first embodied in the Interstate Commerce Act. It was chosen in the Packers and Stockyards Act in 1921, the Federal Communications Act in 1934, the Motor Carrier Act in 1935, the Federal Power Act in 1935, the Civil Aeronautics Act in 1938, and the Freight Forwarder Act in 1942.

This scheme of regulation recognizes that ratemaking is a legislative function and confines regulatory agencies to the exercise of legislative power to fix rates for the future under standards established by the Congress and administered by them as expert bodies acting as arms of the Congress. Hence, once a rate has been fixed pursuant to the standards the Congress has established in accord with the procedures it has prescribed, which procedures afford full opportunity for all to be heard before it is fixed, that rate is the only legal rate and is binding on all. Not even a court can authorize commerce at any other rate. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246. Indeed, were a court to do so it would be just as much usurping legislative power as it would be were it to vary the terms of an act of Congress, for a regulatory commission speaks as the Congress which created it and whose arm it is.

The superiority of this scheme of regulation is perhaps best illustrated by its efficacy in achieving the primary aim of all Federal rate regulation, namely to assure that transportation, communication and similar essential basic services are available to all without discrimination. The full development of all parts of the United States in our system of free enterprise requires the free movement of all goods of all persons in commerce. This in turn requires the availability of common carriage to all at rates that are not only reasonable as such, but of even more importance, at rates that are the same for all in like circumstances. Without such uniformity it is obvious that free and fair competition among shippers in the sale of their goods in the marketplaces of the Nation cannot be achieved. Indeed, the lack of such uniformity was the principal genesis of the act of 1887. See *I.C.C.* v. *Cincinnati R.*, 167 U.S. 479.

As long as the Interstate Commerce Commission confines itself to fixing rates for the future all shippers in like circumstances pay the same rate. Every shipper knows the cost of transportation to him, and of equal importance, knows the cost of transportation to his competitor. These are important rights it was the purpose of the Interstate Commerce Act to assure. *United States* v. *Chicago & A. Ry.*, 148 Fed. 646, affd. 212 U.S. 563. These rights are assured if every rate of every carrier is filed with the Commission, open to public inspection and required by law to be observed. These rights are vitiated if after a shipper has marketed his goods at prices based on his cost of transportation and the cost of transportation to his competitors, that cost can be varied. Yet H.R. 5596 would permit rates to be varied long after the transportation has taken place. Thus, although the Elkins Act (49 U.S.C. 41) makes it criminal for a carrier to give or a shipper to receive any rebate whereby property is transported "at a less rate than that named in the tariffs published and filed by" the carrier, a carrier could effectively circumvent this prohibition at the instance of a favored shipper under the guise of agreeing with his claim that the filed and published rate he had paid was unreasonable, and rebating a portion of the charges based thereon.

The argument is made that the rule of the Supreme Court that H.R. 5596 would overturn sanctions injustice. The Supreme Court answered that argu-

ment in *T.I.M.E. Incorporated* v. *United States*, 359 U.S. at p. 479. It there noted that competitive conditions in the motor carrier industry were such that the possibility of unreasonably high rates presented no problem, and that in the then 24 years of regulation of motor carriers shippers had sought adjudications of the reasonableness of past rates on "only a handful of occasions, despite the Commission's invitation" to do so. Continuing, the Court said:

"Furthermore, this contention overlooks the fact that Congress has in the Motor Carrier Act apparently sought to strike a balance between the interests of the shipper and those of the carrier, and that the statute cut significantly into preexisting rights of the carrier to set his own rates and put them into immediate effect, at least so long as they were within the 'zone of reasonableness.' Under the act a trucker can raise its rates only on 30 days' prior notice, and the ICC may, on its own initiative or on complaint, suspend the effectiveness of the proposed rate for an additional 7 months while its reasonableness is scrutinized. Even if the new rate is eventually determined to be reasonable, the carrier concededly has no avenue whereby to collect the increment of that rate over the previous one for the notice or suspension period. Thus although under the statutory scheme it is possible that a shipper will for a time be forced to pay a rate which he has challenged and which is eventually determined to be unreasonable as to the future, as when the suspension period expires before the ICC has acted on the challenge, it is ordinarily the carrier, rather than the shipper, which is made to suffer by any period of administrative 'lag.'"

In short, the Motor Carrier Act, like every Federal rate regulatory act except the Rail Act and the Water Carrier Act, are "based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief." *Montana-Dakota*, supra, 341 U.S. at p. 263 (dissenting opinion). The validity of that premise has been borne out by the test of time, and by the absence of any effort to amend any of the other Federal rate regulatory statutes to give a right to reparations.

The existence of the right to reparations in the Rail Act is clearly an historical anachronism out of harmony with accepted regulatory methods. It was necessary when the Interstate Commerce Commission lacked legislative power to fix rates for the future. It ceased to be necessary when the Commission was given that power. Nevertheless, as is not uncommon, the statutory provisions granting the right were not repealed when the changes in rate regulatory scheme were made. Indeed, they were not seriously examined in the light of those changes. Nor were they so examined when the Water Carrier Act was enacted in 1940. That act, designed as it was to put water carriers on an equal footing with railroads, simply copied the provisions respecting reparations that were found in the Rail Act.

We do not claim that railroads and water carriers should, but that motor carriers should not, be liable for reparations. On the contrary, we believe that all common carriers should be on the same footing in this respect. However, we submit that the proper way to put them on the same footing is not to extend unsound law, but rather to remove it. We therefore urge that the reparations provisions in parts I and III of the Interstate Commerce Act be repealed, thus bringing those parts into harmony with parts II and IV, as well as with all of the other Federal regulatory statutes, and particularly with the Federal Aviation Act.

Harmony with the Federal Aviation Act is especially necessary for two reasons. First, in the light of the rapidly growing competition of air carriers in the transportation of property, it is manifestly basically unfair to require surface carriers to bear a burden that air carriers don't bear. Second, section 1003 of the Federal Aviation Act provides for through single rates jointly established by air carriers and surface carriers, filed with both the Interstate Commerce Commission and the Civil Aeronautics Board and regulated by a joint board composed of members of each agency. Many such joint rates have been established for air-motor transportation and many more will be established as the increasing size of aircraft makes short air movement less and less economically feasible and thus the use of motor carriage in conjunction with air carriage more and more necessary. Under existing law joint air-motor rates, once legally published, filed, and allowed to become effective, are binding on all. But if H.R. 5596 were enacted the result would be that the motor carrier party to such a joint rate would be liable for reparations on the ground that it was unreasonable, while the air carrier party to it would not. Moreover, were the motor carrier

required to pay reparations it would presumably be unable to recover any portion of the payment from the air carrier.

The most vociferous proponent of H.R. 5596 seems to be the General Accounting Office. It argues that the absence of a right to reparations from motor carriers is costing the United States about $6,000 per week in unreasonable charges. This claim emphasizes a principal vice in allowing reparations, namely, that it permits the shipper to arrogate to itself the determination whether legally established rates are reasonable—a determination that is the exclusive prerogative of the Interstate Commerce Commission.

Thus the appendix to the statement of Mr. Cimokowski, the Assistant General Counsel of the General Accounting Office, lists four categories in which that Office considers legal rates duly published and filed with the Interstate Commerce Commission to be in excess of lawful maximum rates. In each situation that Office has seized upon a decision of the Interstate Commerce Commission explaining why a particular rate or rule is unreasonable to support its opinion that other rates or rules are unreasonable. This ignores the fact that ratemaking is not an exact science. The complex criteria for the administration of the rate regulatory standards established by the Congress cannot be applied with a slide rule. They call for the exercise of a high degree of discretion and judgment that the Congress has confided to the Commission, not to the General Accounting Office.

It follows that Mr. Cimokowski's claim that the United States is paying $6,000 per week in unreasonable charges is sheer assumption. The Commission has not held unreasonable all through rates that are higher than the aggregate of intermediate rates. See *Transcontinental Motor Commodity Rates*, 54 M.C.C. 709. The Commission has not held unreasonable all commodity or exceptions rates higher than class rates. See *Bicycles from Westfield, Mass., to New England and East*, 42 M.C.C. 442. The Commission has not held unreasonable minimum charges applicable to single shipments exceeding the capacity of a single vehicle. See *Horsman Dolls, Inc.*, v. *Riss & Company, Inc.*, 305 I.C.C. 669. The Commission has not held unreasonable all "exclusive use of vehicle rules" that result in charges for less-than-truckload shipments greater than charges for truckload shipments.

Moreover, it is to be noted that the United States has the same rights as every other shipper, and much more ability than many, to complain against and have set aside existing rates found to be unreasonable, and to protest and be heard before changes in rates become effective. In fact the General Services Administration, the Department of Defense, and the Department of Agriculture exercise these rights regularly.

Finally, the United States is not bound by any tariff rates. Under section 22 of the Interstate Commerce Act it can and regularly does solicit and receive transportation at rates substantially below those published and filed for application to the general public.

We submit that we have shown that the enactment of H.R. 5596 is neither necessary nor desirable to achieve the ends of the national transportation policy and the Interstate Commerce Act, that in fact it would be subversive of those ends and out of harmony with the tried and proven rate regulatory scheme embodied in all Federal rate regulatory statutes enacted since 1920, and that consistency and fairness in the treatment of the various types of surface carriers vis-a-vis each other and vis-a-vis air carriers dictates the repeal of the existing reparations provisions in parts I and III of the act.

However, should the Congress determine to allow reparations against motor carriers and freight forwarders we urge that only those who in fact prove damages be allowed to recover. It is axiomatic that the cost of transportation is a part of the cost of producing, manufacturing, and distributing property. Like all other costs, it is borne by the purchaser, either explicitly as when goods are sold f.o.b. point of origin, or implicitly as when goods are sold at a delivered price. It follows that to allow a person, as the existing provisions in part I have been interpreted to do, to recover reparations simply upon a showing that he remitted unreasonable transportation charges to a carrier will in most instances simply give a windfall.

Public policy is not served by the use of the machinery of Government to force one person to bestow a windfall on another. Indeed, it forbids this if, for no other reason than that the time and effort of public officers and the expenditure of public funds to do so, necessarily interfere with and impede the efficient and expeditious performance of the public duties governmental agencies are

created to discharge. Hence the basic rule that suits, must be brought by the real party in interest. See rule 17(a) of Federal Rules of Civil Procedure.

This principle was one of the cogent bases upon which the Supreme Court relied in *Montana-Dakota*, supra, 341 U.S. at p. 254, in denying a purchaser of electric power recovery of allegedly unreasonable rates filed with the Federal Power Commission pursuant to the Federal Power Act. To quote the late Mr. Justice Jackson, speaking for the Court:

"It is urged that this leaves petitioner without a remedy under the Power Act. We agree. In that respect, petitioner is no worse off after losing its lawsuit than its customers are if it wins. Unless we are to assume that this company failed to include its buying costs in its selling rates, we must assume that any unreasonable amounts it paid suppliers it collected from consumers. * * * It is admitted that, if it recoups again what it has already recouped from the public, there is no machinery in or out of court by which others who have paid unreasonable charges to it can recover."

We urge upon the Congress that this reasoning is both sound and applicable in the matter here under consideration.

May I again thank you, Mr. Chairman, for permitting this letter to become part of the record.

Respectfully,

BRYCE REA, JR.,
Counsel for Middle Atlantic Conference.

Mr. STAGGERS. We will also put in the record the statement of Mr. Charles B. Bowling, transportation consultant for the National Grange.

(The statement referred to is as follows:)

STATEMENT OF THE NATIONAL GRANGE IN SUPPORT OF H.R. 5596

My name is Charles B. Bowling. I am the transportation consultant for the National Grange, with headquarters in Washington, D.C.

The Grange has an interest in the pending legislation which refers to existing inequities against shippers via motor trucks.

At the 93d annual session of the National Grange held at Long Beach, Calif., during November 1959 cognizance was taken of the inequity and the following resolution was adopted:

"Shippers have been placed in an awkward situation by failure of Congress to enact protective measures when the Motor Carrier Act of 1935 was passed into law.

"Considerable latitude remains with the motor carriers as to the payment of reparations and collection is difficult. Often the shipper has resorted to the courts to adjudicate claims for reparations justly due when there should be little or no question as to the carrier's liability.

"The U.S. Supreme Court, by its decision on May 18, 1959, spells out the inequitable situation by a 5-to-4 vote, which shippers have been placed in but decided the issue in favor of the carriers. H.R. 8031, a corrective measure, is now pending in Congress.

"The U.S. Supreme Court and the Interstate Commerce Commission have consistently recognized that nothing in part II (motor carrier) of the Interstate Commerce Act creates a statutory liability on the part of the motor carrier to pay reparations for past allegedly unreasonable rates filed. These rulings are evidently based upon the fact that there is conspicuously absent from the Motor Carrier Act (pt. II) any reference to reparations under such conditions. Awards, however, are now permitted under part I (rail) and part III (water) of the same act, because in each there is included a provision to award reparations for unreasonable past rates.

"As can be seen, there is a violent inconsistency in the act that should be remedied by proper amendment, placing the Motor Carrier's responsibility and liability to shippers in the same general category as the railroads and water carriers."

The Grange holds no brief for any mode of transportation as farm products move to market via rail, motor truck, water and airlines. Agricultural products moving via common motor carriers are great in number and tonnage. The Grange is convinced that shippers and receivers of freight have both a legal and moral right to recover damages resulting from the application of unreasonable or unlawful rates.

Under present conditions, however, because all legal efforts have now been exhausted, shippers are without legal recourse to recover reparations as a result of assessing unlawful charges by motor common carriers.

We believe the issue in this instance is so plain that it is unnecessary to go into detail. We ask that the present infirmity in the law be corrected by the passage of H.R. 5596.

Mr. STAGGERS. That will conclude our formal hearings. The committee stands adjourned.

(The following material was submitted for the record:)

FORD MOTOR CO.,
Dearborn, Mich., June 20, 1961.

HON. JOHN BELL WILLIAMS,
Chairman, Transportation and Aeronautics Subcommittee of Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

SIR: I am writing to urge your committee to report favorably on H.R. 5596, a bill to amend the Interstate Commerce Act to make common motor carriers and freight forwarders liable for illegal charges made on past shipments, and I ask that this letter be included in the record as a statement of Ford Motor Co.'s position in support of this bill.

Our company has particular interest in this matter since we have been precluded in the past from suing common motor carriers for unreasonable charges made in the transportation of property for our account. In MC–C–1337, *Ford Motor Company* v. *Standard Transportation Company, Inc., et al.*, decided by the Commission on August 4, 1959, the Interstate Commerce Commission found, on the basis of the then recent U.S. Supreme Court decision in *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464, that it did not have authority to pass upon allegations of unreasonableness and undue prejudice made with reference to past motor carrier charges. Prior to the *T.I.M.E.* case, of course, the courts and the Interstate Commerce Commission had held that shippers could sue motor carriers for excessive charges paid on past shipments.

We understand that this bill has the strong support of various shipper groups and also that it is supported by the Interstate Commerce Commission. We would like to join in the support of this bill for we believe it will remove what we consider to be a significant deficiency in the Interstate Commerce Act as presently written and that its enactment is fully warranted by the needs of the shipping public. For example, under the current provisions of the act, if a shipper in a formal complaint proceeding before the Commission succeeds in establishing that a given rate is unlawfully high or discriminatory, while the rate may be stricken by the Commission as being contrary to law, the shipper cannot sue for reimbursement for the excessive charges paid in the past. This is in spite of the fact that the rates so paid may be found to be clearly illegal. Also, under the Interstate Commerce Act as presently written, the situation with respect to motor carriers is entirely different from that pertaining to rail or water carriers where a shipper is able to recover excessive charges previously paid to carriers. Thus it would seem clear beyond argument that the purpose of this bill is simply to conform the responsibilities of common motor carriers and freight forwarders with those already in effect in the case of rail and water carriers.

We have noted statements to the effect that this legislation is unnecessary since the shipping public already is protected by the investigation and suspension procedures of the Commission. We urge that these procedures do not begin to afford remedies sufficient to protect the interests of the shipping public in this respect. First of all, the Commission's investigation and suspension procedures are effective only as to future rates. Since shippers on most occasions use rates that already are in effect, the act provides no effective remedy or relief against such rates. Under the present law, what the motor carrier has obtained through excessive or illegal rates it can keep.

The only alternative presently available to the shippers—namely, reviewing the myriad of rate filings made by motor carriers so that they, the shippers, might protest those rates which appear to be illegal—is obviously too onerous to be practical. Because of the complexity of most shippers' operations and the intricacy of the rate-filing procedures used by the motor carriers, any effort in this respect, no matter how conscientiously made, could not begin to provide

adequate protection to the shipping public. Also, more often than not a shipper finds itself using rates which already are in effect and which are beyond the point of being tested by the shipper unless, of course, the shipper should choose to follow the cumbersome and expensive procedure of filing a formal complaint with the Commission. On the other hand, an entirely feasible alternative (and one which would impose on the motor carriers no greater obligation than the act attempts to impose on them in the first place) is to permit the shippers to file actions for damages or reparations in those cases where they have paid excessive freight charges.

It must be recognized also that under section 216(g) of the Interstate Commerce Act, if a rate is suspended and the Commission's investigation extends beyond 7 months from the effective date of the rate, the rate automatically goes into effect. Once this happens, the shipper has no recourse whatever for reimbursement of the higher rates paid, even if the Commission ultimately should find that the rates are excessive. Since the final Commission action on contested rates often is not taken until long after the rates have gone into effect, it becomes clear that, even if the Commission's suspension procedures are followed, this is not adequate to give the shippers the protection they need.

It should also be noted that, while the Commission may choose to investigate a given rate, it may refuse to suspend the rate. In such cases, the shipper has no recourse whatever for excessive charges which it may pay during the course of the investigation.

In closing, we should like to note that in the case of rail and motor carriers these carriers are responsible to the shipping public for the reimbursement of past charges paid under illegal rates. In view of this clear responsibility on the part of rail and water carriers, we can see no reason why common motor carriers should be excused from a similar responsibility.

We strongly urge your subcommittee to give favorable consideration to this bill.

Yours very truly,

E. S. KNUTSON.

JUNE 26, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Transportation and Aeronautics Subcommittee of Committee on Interstate and Foreign Commerce, House of Representatives, Washington D.C.:

We understand that Mr. Giles Morrow, general counsel of Freight Forwarders Institute, has submitted a suggested form of amendment to H.R. 5596. This amendment, if enacted, would add the following language to subsection (D) of section 406A of the Interstate Commerce Act:

"*Provided*, That if the award is based on the exaction of a rate found to be unlawful under section 404 of this part the sum ordered to be paid shall be limited to the amount of pecuniary loss actually suffered by complainant, as shown by competent proof, and damages shall not be presumed to result from the payment of a rate found to be unlawful but the burden shall be upon complainant to show the actual amount by which he suffered and ultimately bore pecuniary loss."

We understand that consideration is also being given to the enactment of a similar amendment to part II of the act. Ford Motor Co. opposes Mr. Morrow's suggested amendment or any similar amendment to part II of the act, since in our opinion they would render H.R. 5596 completely ineffective.

Further, the addition of this language, without similar amendments to parts I and III of the Interstate Commerce Act, would simply prolong the discrimination which presently exists between the rail and water carriers on the one hand and motor carriers and freight forwarders on the other. It seems clear to us that the main purpose of H.R. 5596 is to remove the discrimination that presently exists between the various types of carriers. This being so, it makes no sense to us to put the discriminatory features right back into the act through the language of the above-quoted amendment. If the carriers are concerned as to the possible extent of damages to which they might become liable, we suggest that the act could be limited so that the carriers' liability for damages would never exceed the difference between the unreasonable charges paid and the rate subsequently found to be legal and proper. It is Ford's experience that we never seek to recover more than such in any event. Also we do not feel that the proposed amendment would provide any absolute benefit to the

carriers since it would still be possible under the above amendment, upon submission of competent proof, to recover damages in excess of the difference between the legal and the illegal rate.

We therefore urge that the proposed amendment not be included in H.R. 5596.

FORD MOTOR CO.,
E. S. KNUTSON,
Director of Traffic Central Office.

R. J. REYNOLDS TOBACCO CO.,
Winston-Salem, N.C., June 21, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR SIR: Your committee held hearings June 14 and 15 on bill H.R. 5596, proposing to amend the Interstate Commerce Act to provide civil liability for violation of such act by common carriers, motor vehicles, and freight forwarders, and it is my understanding the record was held open an additional 10 days to receive views from other interested parties.

In addition to being traffic manager of this concern, the undersigned is chairman of the Legislative Committee of the North Carolina Traffic League, which has instructed me to express their support of this legislation. At the present time shippers of freight via motor carriers are without recourse or remedy against unlawful or unreasonable economic acts of such carriers. Under the Interstate Commerce Act we have recourse against railroad and water carriers, and as rates and tariffs published by motor carriers have the same effect as a statute, we feel we are entitled to some manner of relief from any unreasonable or unlawful acts.

The North Carolina Traffic League is composed of shippers and receivers of freight in the State of North Carolina, and we strongly urge and hope your committee will approve this legislation.

Yours very truly,

AUGUST HEIST, *Traffic Manager.*

CECO STEEL PRODUCTS CORP.,
Chicago, Ill., June 21, 1961.

SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
House Committee on Interstate and Foreign Commerce,
Washington, D.C.

GENTLEMEN: We wish to specifically support the position of Mr. Charles B. Myers, of Chicago, Ill., in his presentation before your committee, in connection with H.R. 5596, a bill to provide civil liability for violations of the Interstate Commerce Act by motor carriers and freight forwarders.

The examples given by Mr. Myers can be multiplied hundreds, possibly thousands, of times so far as shippers and receivers throughout the country are concerned, particularly the smaller shippers and receivers who either aren't equipped to cope with the motor carriers or who just simply cannot afford to do so. There are many other types of damage inflicted upon the shipping and receiving public by motor carriers for whatever the reason may be and whatever the intention may be which in our opinion will not be corrected until motor carriers, as in the case of railroads, know full well that carelessness or bad intentions on their part in all likelihood will result in appropriate civil penalty. With no civil liability, there is definitely no incentive to take corrective action except in rare cases. As the law stands at the moment even our finest motor carriers, and there are many of them, are helpless to reparate in justifiable cases.

In our business we run into innumerable instances of misrouting by motor carriers for which there is no civil liability on the part of such carriers regardless of how gross the misrouting may be or how much it costs the shipper or receiver. Most of our shipments are sold on a "freight allowed" basis which means that Ceco pays and bears the charges. However, an extremely large number of shipments are sold on a "no freight allowed" basis which means that the receiver who is generally a small firm is penalized in numerous cases in-

volving improper rates or routes. Such smaller shippers have no qualified transportation departments nor do they generally have access to a transportation consulting service that they can afford. Further, the amounts involved per shipment are such that they can't afford to bring suit against the carriers involved for damages.

Motor carriers have become of age, so we sincerely believe that it is time that they accepted their responsibility, having reached their majority.

Yours very truly,

G. A. McElroy,
Manager, Transportation Department.

Emerson Radio & Phonograph Corp.,
Jersey City, N.J., June 19, 1961.

Re H.R. 5596.

Hon. John Bell Williams,
Chairman, Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, Washington, D.C.

Dear Sir: Even though we are late in writing this letter on bill H.R. 5596 dealing with the bill to amend the Interstate Commerce Act to provide civil liability when the act is violated by motor carriers and freight forwarders, we hope that you will give this consideration when reviewing the record.

As a shipper of various items, as well as a receiver of inbound shipments of numerous articles, we have always used the motor carriers and freight forwarders. In the past several years we have seen the most dynamic period in our transportation history. Very often we have found ourselves in a rate predicament where we and the motor carriers agreed that the lawful rates are unjust and unreasonable. Prior to the *TIME, Inc.*, and *Davidson Transfer* cases, it was an accepted practice to ask the Interstate Commerce Commission to review the case and give authorization to either reparate or waive collection for undercharges.

Since the Supreme Court gave its decision, and I might say a rightful one as the act is written, we as a shipper have been penalized in several situations. Unless the act is amended, situations may arise where the freight-paying public will be paying unjust and unreasonable rates without recourse.

We are sure that you and your committee will understand that it is proper and necessary to amend the act so that only just and reasonable rates will be charged.

Very truly yours,

Samuel Portnoy,
General Traffic Manager.

Association of American Railroads,
Washington, D.C., June 13, 1961.

Hon. John Bell Williams,
Chairman, Transportation and Aeronautics Subcommittee, Interstate and Foreign Commerce Committee, U.S. House of Representatives, Washington, D.C.

Dear Sir: Your subcommittee has under consideration and has cheduled hearings June 14 and 15 on H.R. 5596, a bill to amend sections 204a and 406a of the Interstate Commerce Act in order to provide civil liability for violations of such act by common carriers by motor vehicle and freight forwarders. The purpose of this letter is to express support by the Association of American Railroads of H.R. 5596.

Historically, the position of the railroads has been that regulation of the various modes of transportation should be fair, equal, and impartial. Under present law the Interstate Commerce Commission has the power to award damages or reparations for violations of parts I and III of the Interstate Commerce Act, applying to railroads and to common carriers by water. For many years it was assumed that while the Interstate Commerce Commission lacked such authority with respect to violations of parts II and IV, such redress could be obtained from the Federal courts. A recent decision by the U.S. Supreme Court held that neither the Interstate Commerce Commission nor the courts

had authority, leaving shippers without legal remedy for violations of parts II and IV.

We believe this to be another instance of the failure of our regulatory statutes to include all forms of surface transportation in an integrated and coordinated scheme of regulation, with detrimental effect upon the public interest. Consequently, we urge prompt and favorable consideration by your subcommittee of H.R. 5596.

I shall appreciate your having this letter made a part of the record of the hearing conducted by your subcommittee on H.R. 5596.

Very truly yours,

GREGORY S. PRINCE.

HYMAN-MICHAELS CO.,
Chicago, Ill., June 13, 1961.

Re H.R. 5596.

Hon. JOHN BELL WILLIAMS,
Chairman of the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR SIR: The above-referenced bill was introduced by Congressman Harris to amend parts II and IV of the Interstate Commerce Act (49 U.S.C. 301–327, 49 U.S.C. 1001–1022). We attach a statement which we would like to present to your committee in support of this pending legislation. We are advised that hearings of this bill will be held on Wednesday and Thursday, June 14 and 15, but because of the short notice we will be unable to attend.

The burden of the statement is that this legislation is urgently required and would be of immeasurable benefit to shippers and receivers of merchandise using the motor carriers and freight forwarders to move their goods. We urge approval by your committee and earliest passage by the House of this legislation.

Very truly yours,

A. A. DIAMOND, *Traffic Manager.*

STATEMENT WITH REFERENCE TO H.R. 5596

My name is Abraham A. Diamond. I am traffic manager of the Hyman-Michaels Co. of Chicago, Ill., a dealer and broker in scrap iron and steel. I am a practitioner before the Interstate Commerce Commission, and an attorney-at-law, a member of the bar of the State of Illinois and the Supreme Court of the United States.

Since the passage of parts II and IV of the Interstate Commerce Act in 1939 and 1942, respectively, there has been a distinct failure in the enforcement of the will of the Congress with regard to the regulation of these modes of transportation. The regulatory legislation contains prohibitions which State the policy that motor carriers and freight forwarders must not charge excessive or unreasonable rates. Unjust, unreasonable, discriminatory, and prejudicial rates, rules, and practices are declared unlawful.

Until the decision of the Supreme Court of the United States in *T.I.M.E., Inc.* v. *The United States* (79 S. Ct. 904), decided May 8, 1959, the Interstate Commerce Commission and the shippers of the United States had worked out, empirically, a method for justice and obtaining damages for rate exactions held to be unjust and unreasonable by the Interstate Commerce Commission. This involved a cumbersome circuitous method—suits had to be filed prior to handling with the Interstate Commerce Commission for its opinion.

In the past, motor carrier operators and freight forwarders contended that legislation similar to the instant bill was unnecessary; unnecessary because the involved procedure was in existence and could satisfy any reasonable complainant. Another argument used against previous proposals of this nature was that Congress deliberately avoided inclusion of this provision in the original enactments. There is nothing to support this statement other than the admitted omission and the fact that both the motor carrier and freight forwarder industries were to be protected by this congressional shield.

Regardless of what may have been the fact 25 years ago, it does appear that today many shippers are suffering repeated injuries from unjust and unreasonable freight rates, rules, and regulations, technically legal because properly filed, but, unmistakably, unlawful. Shippers may be wronged but have no means of remedying that wrong, or receiving compensation for their injuries.

Any argument that asserts that the Interstate Commerce Commission will be flooded by complaints, frivolous in nature, is not worthy of the motor carrier and freight forwarder industries. Responsible shippers, interested in fostering a healthy national transportation system, common carrier based, and under reasonable governmental regulation, will use the remedies to which they are entitled with caution and circumspection.

This legislation is long overdue, and should be approved and passed in order to right an obvious wrong. I strongly urge, on behalf of my company, the approval of this legislation.

AEROSPACE INDUSTRIES ASSOCIATION OF AMERICA, INC.,
Washington, D.C., June 14, 1961.

Re H.R. 5596.

Hon. JOHN BELL WILLIAMS.
Chairman, Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR SIR: On behalf of the members of this association, we urge that your subcommittee give favorable consideration to H.R. 5596 and that it recommend early enactment of this vital legislation.

The Aerospace Industries Association is a trade association whose membership comprises the principal manufacturers of aircraft, guided missiles, rockets and engines, accessories, parts, materials and components used in the construction and operation of complete aircraft, missiles, and spacecraft. In the course of their operations, members of this association offer considerable quantities of material for transportation by motor carriers and freight forwarders. Accordingly, they have a very material concern, as shippers, in securing remedial legislation which will give them redress before the Interstate Commerce Commission for the recovery of unlawful charges on past shipments transported by those modes of transportation.

At the present time such a remedy is available to them only with respect to violations by railroads and other carriers shbject to part I and water carriers subject to part III of the Interstate Commerce Act. Enactment of H.R. 5596 will merely place all types of regulated interstate carriers on an equal footing, thereby making available to shippers the expert offices of the Interstate Commerce Commission for determination, when occasions arise, as to the reasonableness of rates charged on past shipments. An injured party would also, if he so desired, be given the choice to pursue his remedy in a U.S. district court of competent jurisdiction.

Congress has heretofore considered similar proposals but legislative history indicates that the primary reasons for failure to enact past legislation was the then existing interpretation of the Interstate Commerce Act by the ICC that, predicated upon an administrative determination by the Commission as to the unreasonableness of the rates charged, aggrieved shippers could secure redress for their grievances from the courts under the common law. However, that avenue for relief was closed by the decision of the U.S. Supreme Court in the case of *T.I.M.E., Inc.* v. *United States of America*, 359 U.S. 464, decided May 18, 1959. In the *T.I.M.E.* case, it was held that the failure of Congress to provide for such relief removed all remedies for shippers claiming past unreasonableness of rates, including the common law right to seek redress from the courts.

For that reason, and notwithstanding the maxim in equity to the contrary, shippers by motor carriers and freight forwarders must now suffer a wrong without a remedy. Only Congress can provide the necessary relief, and it is our recommendation that it do so by enactment of H.R. 5596.

It is respectfully requested that this letter be made a part of the record of hearings on this bill.

Your very truly,

ALLEN J. O'BRIEN,
Director, Traffic Service.

NEW YORK, N.Y., *June 13, 1961.*

JOHN BELL WILLIAMS,
Chairman of the Subcommittee on Transportation and Aeronautics of House Committee on Interstate and Foreign Commerce, Washington, D.C.:

Understand hearings are scheduled June 14 and 15 on H.R. 5596. For many years we have been strongly in favor of legislation which would permit reparation on the part of motor carriers and freight forwarders. Due to our inability to appear in person before your committee in support of this resolution we ask that you make record of our strong support for passage.

R. O. ERICKSON, *General Traffic Manager, The Anaconda Co.*

CULLIGAN, INC.,
Northbrook, Ill., June 14, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR SIR: Due to the short notice, we are unable to appear at the hearings on June 14 and 15 you are conducting in connection with the bill, H.R. 5596, to establish a reparation provision in parts II and IV of the Interstate Commerce Act.

Therefore, because of this inability to appear, we ask that the attached statement be included in the record on behalf of Culligan, Inc. We will appreciate anything that can be done in this regard.

Very truly yours,

NOHL A. BRAUN, *Traffic Manager.*

STATEMENT FROM CULLIGAN, INC., NORTHBROOK, ILL.

We understand that Congressman Harris has introduced a bill, H.R. 5596, to establish a reparation provision in parts II and IV of the Interstate Commerce Act.

Since the decision of the Supreme Court of the United States in *T.I.M.E.* v. *The United States of America* (79 S. Ct. 904), decided May 8, 1959, shippers no longer can obtain reparation of excessive or unreasonable charges paid to motor carriers and freight forwarders. In view of the fact that parts II and IV of the Interstate Commerce Act provide that motor carriers and freight forwarders are prohibited from charging excessive or unreasonable rates, it would seem natural that reparations be obtainable when excessive or unreasonable rates are charged and collected. At present a shipper may complain to the Interstate Commerce Commission and upon proof be awarded reparation on this type of charges when a rail or water carrier is involved and it certainly seems reasonable that the law apply likewise to motor carriers and freight forwarders.

We, therefore, are heartily in accord with the provisions of the bill H.R. 5596 and pray that everything possible be done to assure its passage.

Sincerely yours,

NOHL A. BRAUN, *Traffic Manager.*

ABERDEEN CHAMBER OF COMMERCE,
Aberdeen, S. Dak., June 14, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Transportation and Aeronautics Subcommittee, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR SIR: We ask that you put the Aberdeen Chamber of Commerce on record in support of H.R. 5596. As representatives of over 350 shippers and receivers of freight in Aberdeen, S. Dak., we believe that it is high time that common carriers by motor vehicles and freight forwarders be subject to reparation provisions comparable to those now provided in parts I and III of the Interstate Commerce Act for rail and water transportation.

We will not be able to attend the scheduled hearings on June 14 and 15, but I am certain that our support of the provisions in H.R. 5596 will be brought forcefully out by the representative of the National Industrial Traffic League.

Yours truly,

JOHN A. DUPONT, *Traffic Manager.*

NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS,
Washington, D.C., June 15, 1961.

Re H.R. 5596.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR CHAIRMAN WILLIAMS: The National Association of Railroad and Utilities Commissioners is a voluntary organization embracing within its membership the members of the regulatory commissions and boards of the several States of the United States. These are the State agencies charged by statute with the duty of regulating the transportation agencies and public utilities operating in their respective States.

At a regular meeting of the executive committee held in Washington, D.C., on March 8 and 9 of this year, a resolution was adopted urging the enactment of S. 676 and H.R. 2765, 87th Congress. Such legislation would permit shippers to cover reparations from motor carriers for unreasonable charges on past shipments.

H.R. 5596 embraces this same relief. I understand that hearings were held before your subcommittee yesterday and today on H.R. 5596. Enclosed is a copy of a resolution adopted by the executive committee of this association in support of such legislation and it would be appreciated if this could be incorporated in the record of your hearings.

Thanking you for your cooperation, I remain,

Sincerely yours,

AUSTIN L. ROBERTS, Jr.,
General Solicitor.

RESOLUTION FAVORING ENACTMENT OF S. 676 AND H.R. 2765, 87TH CONGRESS

Whereas the U.S. Supreme Court, in a 5–4 decision, has held that shippers cannot recover reparations from motor carriers for unreasonable charges on past shipments (*T.I.M.E., Inc.*, v. *U.S.*, 359 U.S. 464); and

Whereas this decision has nullified the longstanding procedure established in the case of *Bell Potato Chip Co.* v. *Aberdeen Truck Lines* (43 M.C.C. 337), under which shippers via motor carrier could obtain reparation where rates on past movements were shown to be unreasonable; and

Whereas such decision has completely and effectually barred any recovery by any means of unreasonable charges on past shipments via motor carrier; and

Whereas there has been introduced in the 87th Congress S. 676 and H.R. 2765 to provide for reparation awards in connection with shipments via motor carriers; and

Whereas reparations are presently provided for in connection with shipments via railroads and water carriers, and there is no justification for denying to the public the same right of redress in connection with shipments via motor carriers: Now, therefore, be it

Resolved, That the executive committee of the National Association of Railroad and Utilities Commissioners hereby go on record as favoring and urging enactment of S. 676 and H.R. 2765; and

Resolved further, That a copy of this resolution be sent by the secretary to tives of the association are hereby authorized to appear on behalf of the association at any hearing that may be held before any committee of Congress to consider any legislation looking toward embodying the relief proposed in these bills and present the views of the association as expressed herein;

Resolved further, That a copy of this resolution be sent by the secretary of each member of the Committees on Interstate and Foreign Commerce of the Senate and the House.

THE SOUTHWESTERN INDUSTRIAL TRAFFIC LEAGUE,
Dallas, Tex., June 21, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics,
House Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR CONGRESSMAN WILLIAMS: The Southwestern Industrial Traffic League understands that hearings were completed on June 14 and 15 on H.R. 5596, a bill to amend the Interstate Commerce Act in order to provide civil liability for violations of said act by common carriers by motor vehicle and freight forwarder; and that the record has been held open for an additional 10 days in order to receive representations from other interested parties.

The Southwestern Industrial Traffic League is an association of transportation directors and traffic managers representing industry and commercial organizations throughout the Southwest. It has no carrier membership. The league speaks for its membership in matters of general transportation interests.

We support the principles contemplated by H.R. 5596. It is the view of the membership of this league that the time has come when motor carriers and freight frowarders should be expected to accept their responsibility to the shipping public in the same manner as railroads and water carriers under parts I and III of the Interstate Commerce Act.

We sincerely hope that this bill will be favorably reported out of your committee, and that it will eventually be enacted into law as a part of the Interstate Commerce Act.

Yours truly,

C. M. DAWKINS, *President.*

THE TEXAS INDUSTRIAL TRAFFIC LEAGUE,
Dallas, Tex., June 21, 1961.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics,
House Committee on Interstate and Foreign Commerce,
Washington, D.C.

MY DEAR CONGRESSMAN WILLIAMS: We understand that hearings were held on June 14 and 15 on H.R. 5596, a bill to amend the Interstate Commerce Act to provide civil liability for violations of such act by common carriers by motor vehicle and freight forwarder, and that since only 2 days of hearings were scheduled the record is being held open for an additional 10 days to receive the views of other interested parties.

The Texas Industrial Traffic League is a nonprofit Texas corporation, organized to promote the transportation interests of its membership. The membership of the league is made up of Texas business firms, industries, and commercial organizations throughout the State. It speaks in behalf of its membership in matters of general transportation interest.

The league supports the objectives of H.R. 5596. The bill seeks to remedy an unfair situation which exists to the detriment of the shipping public. Under parts I and III of the Interstate Commerce Act, a remedy at law in the form of damages or reparation, where justified, is available to a shipper who is injured by a violation of the Interstate Commerce Act, on the part of railroads or water carriers, but there are no comparable provisions in parts II and IV of the act which govern motor carriers and freight forwarders, respectively.

Up until a recent decision of the Supreme Court in *T.I.M.E.* v. *United States* (359 U.S. 464), there was available to the shipping public a partial but somewhat complex and not entirely satisfactory remedy for violation of the act by a motor carrier, but the Court's decision in that case has taken away even that partial relief.

There is a general feeling among the shipping public that the motor carrier and freight forwarder industries have arrived at a stage of maturity which warrants their being made answerable to the shipping public for injury resulting from their violations of the act. The present status of the law permits these carriers to avoid their responsibility to the public through delays, and in the case of motor carriers, misrouting, as well as through other devices, with no fear of retribution.

The situation is one which has actually needed correcting for a great many years—motor carriers and freight forwarders should be expected to live up to their responsibilities in the same manner and to the same degree as railroads and water carriers.

We sincerely hope that H.R. 5596 will have your most favorable consideration.

Respectfully submitted,

S. C. O'NEAL,
Chairman, Legislative Committee.

PITTSBURGH, PA., *June 14, 1961.*

CHAIRMAN, SUBCOMMITTEE ON TRANSPORTATION AND AERONAUTICS,
HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.:

The National Supply Division, Armco Steel Corp., favors House bill 5596 which provides civil liability for violation of the act by motor and freight forwarders common carriers.

W. E. STAUFFER, *Traffic Manager.*

NATIONAL RETAIL MERCHANTS ASSOCIATION,
June 12, 1961.

Subject: H.R. 5596.

Hon. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics,
House Committee on Interstate and Foreign Commerce,
Washington, D.C.

DEAR CHAIRMAN WILLIAMS: The National Retail Merchants Association, Inc., under the laws of New York State in 1911, is a national trade association for department, specialty, and chain stores with a membership in all of the 50 States. It has approximately 11,500 member stores whose total annual sales volume is about $19 billion. Representative of its membership are R. H. Macy & Co., New York; Marshall Field & Co., Chicago; Woodward & Lothrop, Washington, D.C.; the J. L. Hudson Co., Detroit, and many other stores whose names are well known throughout the country. These stores are large users of all forms of transportation including motor common carriers, subject to part II of the Interstate Commerce Act, and freight forwarders, subject to part IV. On practically all shipments our members pay the transportation charges.

It has long been a matter of basic transportation policy of this association that motor carriers and freight forwarders should be subject to reparation provisions similar to the railroads under part I and water carriers under part III of the Interstate Commerce Act.

It seems like a matter of simple justice that our members be permitted to recover excess transportation charges when motor carriers or freight forwarders impose unreasonable freight rates. We are able to recover such charges from railroad and steamship lines, why shouldn't we have the same right with motor common carrier and freight forwarders. This has always been important but it becomes particularly important in view of the Supreme Court's 5 to 4 decision in No. 68, *TIME, Inc.* v. *U.S.*, and No. 96 *Davidson Transfer and Storage Company, Inc.*, v. *U.S.*, wherein the court found that "under the statute the recovery of reparations or damages arising from the application of unreasonable rates on past motor carrier shipments is precluded."

It is our understanding that hearings will be held on H.R. 5596 on June 14 and 15, 1961, and we also understand that because only 2 days of hearings have been arranged it will not be possible for us to personally appear before your committee and testify. Consequently, we would appreciate very much you taking our views into consideration and we respectfully request that you make our letter a part of the record of the hearings.

Respectfully,

ROBERT E. VANTINE,
Chairman, NRMA Transportation Committee.

STATEMENT OF ILLINOIS TERRITORY INDUSTRIAL TRAFFIC LEAGUE IN SUPPORT OF BILL H.R. 5596

My name is P. W. Kroeker. I am Director of Transportation for Curtiss Candy Co., Chicago, Ill. I have been active in transportation circles for 30 years, and currently, among other things, am president of the Illinois Territory Industrial Traffic League.

The Illinois Territory Industrial Traffic League is a voluntary, unincorporated nonprofit association, organized for the purpose of promoting and protecting transportation interests of business and industry located throughout the State of Illinois and the immediately adjacent territory. It's membership embraces substantially all types of industry, including chambers of commerce and trade associations. It's membership currently stands at 223 members who use all forms of transportation by rail, water, freight forwarder, and motor carrier.

Bill H.R. 5596 is one of several pending bills designed to correct obviously an unfair situation which adversely affects the interests of the shipping public. Under parts I and III of the Interstate Commerce Act, a shipper who is injured by a violation of the act by a railroad or a water carrier, has a remedy at law and can obtain damages or reparation where justified.

There are no comparable provisions in parts II and IV of the act governing motor carriers and freight forwarders, and the Supreme Court in *T.I.M.E.* v. *United States* (359 U.S. 464, 3 L. ed. 2d 952 (1959)), has recently held that the law precludes any reparation for damage arising out of the past application of unreasonable rates. The effect of that decision was to leave shippers without any remedy in law for a violation of the act by a motor carrier. At the same time, the rapid growth and increasing dominant position of motor carriers and freight forwarders in the transportation industry has given rise to a greater need than has heretofore existed for protection of shippers against violations of the act. There is, therefore, much interest and concern on the part of individual shippers for remedial legislation which is felt to be already long overdue.

In hearings before congressional committees covering earlier legislation on this subject, motor carrier operators and freight forwarders have contended that there was no need for a revision of the law since shippers already had the right to obtain reparation. The motor carriers and freight forwarders said that the elimination of the requirement to file a suit in a court in addition to a proceeding before the Interstate Commerce Commission would invite a large number of claims, thus placing an undue burden upon the motor carrier and freight forwarder industry. The decision in the *T.I.M.E.* case, however, has now completely abolished any opportunity for a shipper to obtain redress on shipments moving by motor carriers and freight forwarders even though the charges assessed and paid were excessive, unreasonable or otherwise unlawful.

What the shipping public needs and desires is the enactment of provisions with respect to motor carriers and freight forwarders similar to those which have long existed with respect to railroads and water carriers. Such provisions are well drafted in H.R. 5596 and would simply put into effect measures which the original framers of the Motor Carrier Act envisaged as a probable future necessity. The motor carrier and freight forwarding industries have now come of age and should be made responsible in the same way as the railroads and water carriers. The Illinois Territory Industrial Traffic League, speaking for member shippers generally, believes that it is only right that they should have some remedy when they are injured by any act of a motor carrier or freight forwarder which is contrary to law. While it may have been true 25 years ago that there was little need for such protection and the carriers were in a formative stage, that situation is not the case today.

We, therefore, urge that H.R. 5596 be reported favorably.

P. W. KROEKER, *President.*

AUTOMOBILE MANUFACTURERS ASSOCIATION, INC.,
Detroit, Mich., June 22, 1961.

Hon. OREN HARRIS,
Chairman, House Committee on Interstate and Foreign Commerce,
Washington, D.C.

DEAR CHAIRMAN HARRIS: The Automobile Manufacturers Association endorses House bill 5596 to provide civil liability for violations of the Interstate Commerce Act by common carriers by motor vehicle and freight forwarders. It is

respectfully requested that this letter be included in the record of committee hearings on this bill.

This legislation would establish a procedure for reparation awards and limitations of actions with respect to motor carrier and freight forwarder operations subject to parts II and IV of the Interstate Commerce Act comparable to that now provided in parts I and III of the act for rail and water transportation.

In 1935 Congress enacted the Motor Carrier Act, which has since become part II of the Interstate Commerce Act. Section 216(d) provides in part:

"All charges made for any services rendered * * * by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of * * * property shall be just and reasonable, and every unjust and unreasonable charge for such service * * * is prohibited and declared to be unlawful."

Under the present interpretation of the statute, a tariff rate filed by a motor carrier or freight forwarder, regardless of how unreasonable or unlawful, is required by law to be charged by the carrier and paid by the shipper until that rate is ordered changed by the Interstate Commerce Commission. Shippers are now, by reason of the ruling of the Supreme Court, deprived of their right to a determination as to just and reasonable rates on shipments already made or to recover reparation for the excess paid over the reasonable rates. This situation does not exist in rail and water charges. The Interstate Commerce Act gives shippers a legal right to reparation for unreasonable rail and water charges collected by the carrier. It is felt that enactment of the proposed amendment would, in this respect, place all four classes of carriers under the jurisdiction of the Interstate Commerce Commission on a uniform footing.

Sincerely yours,

HARRY A. WILLIAMS, *Managing Director.*

AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., June 8, 1961.

HON. JOHN BELL WILLIAMS,
Chairman, Subcommittee on Transportation and Aeronautics, House Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR MR. WILLIAMS: This is to set forth the policy of the American Farm Bureau Federation relative to H.R. 5596, which would authorize civil action for overcharges by motor vehicle common carriers and freight forwarders.

At our last annual meeting the voting delegates of the member State Farm Bureaus adopted the following policy:

"We recommend amendment of the Interstate Commerce Act to provide that the Interstate Commerce Commission may award reparations for unlawful rates charged by motor common carriers, in the same manner as now authorized in the case of rail and water carriers."

We can see no reason why there should be any distinction between the various types of common carriers in this respect.

We, therefore, respectfully recommend favorable action on H.R. 5596 by the Subcommittee on Transportation and Aeronautics.

It will be appreciated if you will incorporate this letter in the hearing record.

Very sincerely,

MATT TRIGGS, *Assistant Legislative Director.*

AMERICAN RETAIL FEDERATION,
Washington, D.C., June 22, 1961.

MR. OREN HARRIS,
Chairman, Interstate and Foreign Commerce Committee,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN HARRIS: The Transportation Committee of the American Retail Federation would appreciate the privilege of expressing its views in support of H.R. 5596, introduced by you on March 14, 1961, which provides civil liability for violation of the Interstate Commerce Act by common carriers by motor vehicle and freight forwarders. The American Retail Federation supports the views expressed in hearings before your Subcommittee on Transportation and Aeronautics at hearings on June 14, 1961, by the Interstate Commerce Committee and the General Accounting Office.

The technical nature of the proposed amendments have been well explained by the witnesses. There is an inequality of treatment as to rail and water carriers, presently subjected to civil liabilities or reparations, as contrasted to motor carriers and forwarders who are not. The bill under consideration would provide equal treatment for all.

It perhaps should be noted by your committee that retailers, even with large traffic departments, find it an almost impossible task to determine, in advance of the consigning of shipments, the rates or charges that will be assessed by the motor carriers or forwarders. This is because of the thousands of tariffs and literally millions of rates, rules, regulations, and charges, in effect at any given time. If an effort is made to determine the proper rate or charge in advance of a shipment, a retail shipper cannot rely on quotations by the carriers themselves for it has been held that these are not determinative and the proper charge can only be determined by application of the tariff schedules on file with the Interstate Commerce Commission. Therefore, in many cases the true or lawful rate is frequently determined long after the shipment has moved, and this will be of no benefit to the shipper unless he has some means of enforcing the carriers to the application of lawful rates.

Further, it is believed that passage of this remedial legislation will have a beneficial effect even though no particular suits are brought to enforce payment under the terms of the bill. This is because carriers will not be inclined to be derelict in the publication of irresponsible rates and charges if they are held to be liable for the results. In the absence of any such liability, there is more apt to be unlicensed attempts at radical tariff publications.

For these reasons the transportation committee urges favorable approval of this bill.

Yours very truly,

CHARLES A. WASHER, *Traffic Manager.*

INTERSTATE COMMERCE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., July 6, 1961.

HON. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives,
Washington, D.C.

DEAR CHAIRMAN HARRIS: The Commission has been notified orally of a proposed amendment to H.R. 5596 which was offered by a witness for the Freight Forwarders Institute during the course of his testimony on that bill before the Transportation and Aeronautics Subcommittee. In view of the fact that the proposed amendment was offered subsequent to the Commission's testimony on this measure, and since the full committee will no doubt soon be considering the bill and the propoed amendment, we would like to offer the following comments with respect to the amendment.

Under the terms of the amendment an award of reparation based on a past unlawful rate would be limited "to the amount of pecuniary loss actually suffered by complainant." The amendment would also require that the complainant show the actual amount by which he suffered and ultimately bore pecuniary loss. We are of the view that if this proposed amendment is adopted, it would, as a practical matter, defeat the principal purpose of the bill.

In view of the many complex competitive relationships in our economy, it is difficult to see how a shipper would be able to show to what extent, if at all, he was able to pass to his next vendee the difference between the rate found to be unreasonable and the amount he should have paid under a lawful rate. It would also be unrealistic, in our opinion, to expect a shipper to be able to show how much business he may have lost to competitors by reason of his having had to pay an unlawful rate. Because of such difficulties, the measure of damages in such instances has traditionally been measured by the difference between the rate found to be unreasonable and the amount which would have been paid under a lawful rate. Otherwise shippers seeking reparations would in effect be charged different rates for identical transportation depending upon the amount of actual damages each is able to prove. As such damages may have no relation to transportation conditions, the result would be to defeat the principle of equality of treatment of all shippers in connection with common carriage.

In addition to the foregoing objections to the amendment, we feel that it would tend to open the door to abuses by encouraging the more unscruplous type of carrier, being aware of the difficulty of proof, to file rates of questionable lawfulness. He would do this with the hope that, in view of the thousands of rates filed, such rates would become effective without protest, and that even if later challenged and found unlawful he would escape liability for damages on past shipments because of the difficulty of proof.

Moreover, one of the principal purposes of H.R. 5596 is to bring parts II and IV of the Interstate Commerce Act into conformity with parts I and III thereof with respect to carrier liability for damages growing out of past unlawful rates. Adoption of the proposed amendment to the bill either with respect to freight forwarders under part IV or motor carriers under part II would destroy the uniformity of treatment sought by the bill, and if extended to parts I and III would, of course, be subject to the same objections stated above.

We therefore strongly recommend that the bill be enacted as introduced, and that the proposed amendment thereto be rejected.

Respectfully submitted.

_____, _____,
Acting Chairman, Committee on Legislation.
RUPERT L. MURPHY.
HOWARD G. FREAS.
KENNETH H. TUGGLE.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, July 7, 1961.

HON. OREN HARRIS,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. CHAIRMAN: During the course of the hearings June 14 and 15, 1961, before the Subcommittee on Transportation and Aeronautics, on H.R. 5596, a bill to amend sections 204a and 406a of the Interstate Commerce Act to subject motor common carriers and freight forwarders to civil liability for violations of the act, an amendment to the bill was offered by Mr. Giles Morrow, general counsel for the Freight Forwarders Institute. Mr. James F. Fort, counsel for the American Trucking Association, Inc., in answer to questioning from subcommittee members, endorsed the amendment for application to motor common carriers, should the bill be acted upon favorably.

We desire to express for the record our opposition to the inclusion of the Morrow amendment in H.R. 5596. While it is couched in vague and imprecise language and is too broad in scope, we deduced from Mr. Morrow's testimony that the purpose and intent of his amendment is to limit recovery for the exaction of unreasonable rates and charges to proven direct damage, rather than to the excess paid over the reasonable rate or charge. Under such a limitation, then, the only parties who could recover would be those who proved specific pecuniary loss personally suffered and not passed on to third parties, strangers to the transaction with the carriers. For example, recovery could not be had by a manufacturer, wholesaler, or retailer who, by including it in the selling price, passed on an unlawful transportation charge to subsequent purchasers of the goods transported. There conceivably could be occasions when an injured party might undertake to establish by various varied cost and selling data and information that only a part or none of the unlawful charge was included in his selling price, as where he sold at a loss. It may be appreciated that litigation which contemplates proof beyond that directely related to the transportation rates and charges can be very difficult to adjudicate.

We oppose the amendment (1) because such vagueness and imprecision in statutory language is all too frequently productive of more problems than there are solutions; (2) because it would defeat one of the aims of H.R. 5596—uniformity in the treatment of regulated carriers—by continuing the inequity of permitting motor common carriers and freight forwarders, unlike rail and water common carriers, to escape the consequences of their exaction of unlawful rates and charges when the injured parties fail to prove "the amount of pecuniary loss actually suffered"; and (3) because the application to all parts of section 404 (and presumably to all parts of section 216(d)) is unnecessarily broad since much case law has already accumulated setting forth the principles and rules regarding proof of damage and new language in the law would tend to excite litiga-

tion afresh over the requisites of proof in matters involving undue or unreasonable preference or advantages, unjust discrimination, and undue or unreasonable prejudice, as distinguished from matters involving the limited area of unreasonable rates and charges.

We have additional objections. The amendment subverts a basic legal concept, rooted in the common law, which the Interstate Commerce Commission and the courts have followed consistently since the inception of Federal regulation of rail common carriers. This concept is that the shipper has a legal right to a reasonable rate, that exaction of an unreasonable rate imports legal damage, and that the measure of the damage suffered is the difference between the rate paid and the reasonable rate which should have been paid. The carrier's tort, for which the law allows compensation, is the wrongful exaction from the shipper, not the unlawful receipt or unjust enrichment of the carrier. *Louisville & Nashville R. Co.* v. *Sloss-Sheffield Steel & Iron Co.* (269 U.S. 217, 234). The concept of legal wrong flowing from discrimination or prejudice differs fundamentally: an unreasonable rate is always unlawful, whether unreasonably high or unreasonably low; discrimination and prejudice are not necessarily so, since the factors determining reasonableness (cost of service, profit to the carrier, competition, etc.) may, in particular situations, operate in justification. Consequently, proof of actual damage suffered by the complainant is essential to establish such unlawfulness. See *Pennsylvania Railroad Co.* v. *International Coal Mining Co.* (239 U.S. 184). Under the differing concept of rate unreasonableness, however, once the abstract concept of unreasonableness embodied in the statute, which allows a substantial spread between what is unreasonable because too high and what is unreasonable because too low—the "zone of reasonableness"—has been reduced to concrete expression as the dollars-and-cents rate for the service in question, the complainant's damages are ascertainable with mathematical certitude.

The legal memorandum Mr. Morrow offered in support of his amendment fails to differentiate between these legal concepts. It is, purportedly, an expression of the viewpoint held by the Interstate Commerce Commission over 30 years ago and admittedly abandoned, undoubtedly because the Commission came to perceive clearly this inherent distinction in the law. We think it a sufficient answer to this memorandum that the Commission has receded from that viewpoint, which was based entirely upon dicta enunciated in *Southern Pacific Company* v. *Darnell-Taenzer Lumber Company* (245 U.S. 531), although the case was in fact decided upon the established rule of law, and that the Commission, as well as the courts, have consistently followed the precedents of the *International Coal* case, the *Sloss-Sheffield* case, and the *Darnell-Taenzer* case. We do not think an abrupt departure from prevailing and well-settled law should be sanctioned through the casual adoption of this amendment.

We would like to emphasize a portion of the quotation from the *Darnell-Taenzer Lumber Co.* case appearing on page 2 of Mr. Morrow's printed statement: "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and *it does not inquire into later events.*" [Italic supplied.] These observations by the Supreme Court of the United States related to the situation where the claimant, as seller, had already collected from his customer the freight charges which the seller advanced and now was attacking as unreasonable. As the case shows the seller, notwithstanding that he was fully reimbursed for the freight charges by his customer, also collected damages from the carrier because of the unreasonable rate. The Supreme Court said:

"The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it away from him is the one that alone was in relation with him, and from whom the carrier took the sum. * * * Behind the technical mode of statement in the consideration well emphasized by the Interstate Commerce Commission, of the *endlessness and futility of the effort to follow every transaction to its ultimate result* (131 I.C.C. 680). Probably in the end the public pays the damages in most cases of compensated torts." [Italic supplied.]

Just as the right of a common carrier to charge a certain sum for freight does not depend at all upon the fact whether its customers are making or losing by their business (*Union Pacific Ry.* v. *Goodridge*, 149 U.S. 680, 695), so should not those customers have to produce evidence pertinent to their sales and prices

to their customers as a part of the burden of proof in support of reparation for unreasonable freight rates and charges. Obviously, the fact that a shipper is placed at a competitive disadvantage because of a high freight rate on his products has nothing to do with the reasonableness or unreasonableness of that rate under the Interstate Commerce Act.

The Morrow amendment obviously would seriously weaken H.R. 5596, intended to subject motor common carriers and freight forwarders to the same rules of civil liability for violations of the act which now obtain as to rail and water common carriers subject to parts I and III of the act, since it would compel application of a different rule in unreasonable rate cases: proof of pecuniary loss actually suffered (that is, not passed on to third parties). The next step, should this amendment be adopted, would be its extension to part I and part III carriers. Such piecemeal erosion of the statute, in derogation of long and securely established rules of law well known and understood in the transportation industry and by the shipping public, is not in the interest of the public, the shippers, or the carriers.

The witnesses who advocated this amendment at the hearings suggested that it should be of little concern to the Government, as to which the question of passing on freight charges to third parties is unlikely to arise. To some extent this is true: much Government traffic moves from Government installations to other Government installations for use by Government personnel. Other circumstances occur, however, as when (1) the Government ships its goods for use by contractors engaged in its projects, and when (2) the Government, as the ultimate vendee of a vendor who paid an unreasonable freight rate, pays a purchase price which includes the unreasonable freight charge as a separate factor. In the first instance, when the United States seeks to recover the unreasonable freight charge it has paid, under the Morrow amendment, it would be necessary to prove that the unreasonable charge had not been passed on to the contractor. In the second instance, the Government could choose between suffering without seeking adjustment for the exaction of a price higher than justified because of the inclusion of the unreasonable charge, or, in an action against the carrier, seek to prove the inclusion of the unreasonable charge in the purchase price and to answer defenses of lack of privity with the carrier, remoteness, and the speculative nature of the damages borne.

This amendment is in fact a litigious proposal. If it is enacted, we foresee costly and endless controversy and disruption of the fairly orderly means the law provides to establish civil liability for violations of parts I and III, which H.R. 5596, in the interests of uniformity and fair dealing, was intended to make available with respect to parts II and IV. We are strongly in favor of H.R. 5596 as originally introduced, without the amendment recommended by Mr. Morrow.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

(Whereupon, at 12 noon, the committee recessed, subject to the call of the Chair.)

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